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No. 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UTAH PIE COMPANY, *Petitioner,*

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY, and PET MILK COMPANY, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT CONTINENTAL BAKING COMPANY

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BRIEF FOR RESPONDENT CONTINENTAL BAKING COMPANY

QUESTIONS PRESENTED

Petitioner has accurately stated the three questions this Court has asked the parties to brief and argue. The additional issues as to Continental Baking Company are more accurately stated as follows:

1. Was the Court of Appeals correct in holding that Section 2(a) of the Robinson-Patman Act does not forbid a seller reducing its prices in a market in which

it is a marginal competitor and where it has been unable to sell at higher prices, without similarly reducing its prices in all the other unrelated markets in which it competes, where the lower price is offered for a total of only four weeks, and is the competitive equivalent of the price of the largest volume seller in the market?

2. Was the Court of Appeals correct in holding that the evidence was insufficient to support a finding that petitioner had been injured in its business or property by reason of sales by Continental at alleged unlawful discriminatory prices where the record affirmatively shows that petitioner achieved substantially increased sales and profits throughout the relevant period, and where the record contains no competent evidence of any loss of sales or profits by petitioner in any way related to any of the alleged unlawful sales?

3. In the alternative, may the Court of Appeals' decision be sustained on the ground that the evidence was insufficient to show that the claimed injury to competition and damage to petitioner was caused by any difference between the prices charged by Continental in unrelated markets; *i.e.*, that no connection was shown between the sporadic prices complained of and Continental's prices in any other market?

4. Did the Court of Appeals abuse its discretion in failing to grant petitioner a new trial on a claim of having suffered damage in the Denver market as a result of sales at alleged unlawful discriminatory prices where petitioner never asked for a new trial, where petitioner's claims as to the Denver market have been inconsistent and ambivalent throughout this litigation and where the evidence of record—which peti-

tioner does not claim would be supplemented on a new trial—is wholly insufficient to support petitioner's new claim?

STATUTES INVOLVED

28 U.S.C. § 2106, set out in Appendix A, should be added to the list of statutes and rules set out in petitioner's Brief.

STATEMENT OF THE CASE

I. The Proceedings Below

The complaint in this action was filed September 8, 1961. It charged three defendants with having conspired, in violation of Section 1 of the Sherman Act, "to destroy the competition of plaintiff." It also alleged that each defendant had violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by charging low prices "in the State of Utah" and high prices in an area variously described as "western states other than the State of Utah" and "neighboring states to Utah" with the effect of probably lessening competition "in the State of Utah." (R. 16-20.)

The conspiracy claim and the three separate claims under Section 2(a) of the amended Clayton Act were all tried together in the District Court for the District of Utah, Chief Judge Ritter presiding, in February, 1963, that court having denied a motion by each defendant for severance of the individual Section 2(a) claims. (R. 36-40.) At the same time a counterclaim against Utah Pie filed by Continental also alleging a a violation of Section 2(a) was tried.

The trial consumed approximately three weeks. The result of the refusal to sever petitioner's separate

claims was, as noted by the Court of Appeals, that the evidence relating to the various claims was "commingled and presented to the jury in mass" making the jury's task "a most difficult if not an impossible one." (R. 1511.) Continental moved for a directed verdict at the close of the evidence, which motion was peremptorily denied. (R. 1228-29.) Plaintiff purposefully made no motion on Continental's counterclaim (R. 1413-14.) The jury returned a verdict in favor of Continental and the other defendants on the Sherman Act conspiracy claim, and it also found in Continental's favor on its counterclaim. The jury also returned a verdict in favor of Utah Pie against each of the defendants individually on petitioner's allegation of violation of Section 2(a). (R. 1405-06.)

Continental moved for judgment n.o.v. on Utah Pie's Robinson-Patman Act claim, or alternatively for a new trial and, again, the motion was peremptorily denied. (R. 59, 1420.) The trial court then entered judgment for Utah Pie for three times the verdicts against each of the defendants, plus attorneys' fees in the amount demanded. (R. 47, 1407, 1409.) The trial court granted Continental's motion for judgment on its counterclaim but reversed itself the next day and entered judgment n.o.v. against Continental, even though petitioner had not moved for a directed verdict prior to submission of the case to the jury. (R. 1407, 1422.) The trial court also granted injunctive relief in exactly the language requested by Utah Pie's counsel which would require Continental in perpetuity to charge prices for its frozen pies in Washington, Utah, Idaho and Montana no lower than those charged in California, and to charge prices in Colorado no lower than prices charged in Iowa. (R. 47-48, 1412-13.)

The Tenth Circuit Court of Appeals, per Chief Judge Murrah, Judge Lewis and Judge Phillips, reversed each of the trial court's judgments appealed from in the light of a detailed analysis of the record consuming 75 pages of the present Record. (R. 1451-1525.) The court remanded the case with instructions to enter judgment for each of the defendants on petitioner's price discrimination claims and, sua sponte, directed that a new trial be granted petitioner on Continental's counterclaim. (R. 1526.) At no time did Utah Pie ever move, either in the trial court or in the Court of Appeals, for a new trial in the event of a reversal of its judgment against any of the defendants, and it never even suggested it had any grounds for such a new trial.

II. The Frozen Fruit Pie Industry

The areas of effective competition in the frozen pie industry are found in each metropolitan center in the nation. There is no national or even regional market. The Court of Appeals correctly found that in each of the western states "there are one or more separate and distinct frozen pie market areas, which comprise a large metropolitan center and the territory closely adjacent thereto. There are distinct frozen pie market areas in Los Angeles, San Francisco, Seattle, Portland, Salt Lake City, Phoenix, and Denver." (R. 1455.) These markets are defined by the circulation areas of the metropolitan newspapers because food retailers compete through newspaper advertising, and "retail advertising is the lifeblood of the frozen pie industry and crucial to volume sales." *Ibid.* Retail prices in each market tend to be set by these competing advertisements. In turn, manufacturers' prices must be geared in each market so as to permit a competitive price at retail. (R. 192, 203, 696, 710.)

The competitive makeup of each of the markets is different. The competing sellers in each market differ in number and identity. Some markets, such as Salt Lake City, are affected by a low-price local producer with a substantial freight advantage. In each market the identity and number of available customers varies. All buying, even by national chains, is local for each market, and many buyers have their own private label or controlled[1] brands which they buy at low prices. Consumer tastes vary from market to market. In some markets frozen dessert pies are more popular than in others; San Francisco is predominantly a nine-inch pie market rather than eight-inch as is Salt Lake City; flavors popular in some markets will not sell in others. State marketing laws also differentiate the markets. Utah, for instance, requires a six per cent mark up by retailers over the price appearing on the initial invoice. This effectively eliminates some of the kinds of promotions that are used by sellers in other markets. (R. 1455-58; R. 93, 194, 221, 467-68, 651-54; Pl. Ex. 67, 69, 72, 74; R. 458, 2509, 2512, 2524, 2527.)

Frozen fruit pies are a relatively new convenience food product. The industry has experienced substantial growth. There is no proof that any seller in any market can command a price higher than its competitors simply because of its brand name, and there is no evidence that any seller, except Utah Pie in Salt Lake City, commanded anything like a dominant share

[1] A "private" label is owned by the buyer; a "controlled" label is owned by the manufacturer and contracted to one buyer in a market, on an exclusive basis. Utah Pie contracted its controlled label exclusively to Associated Grocers in the Salt Lake City market, but remained free to sell under that label in other markets. (R. 780.)

of any market. (R. 1458; R. 186; Pl. Ex. 62; R. 437, 2323.)

After reviewing the facts of record about this industry the Court of Appeals found:

> "Because the competitive thrusts and pressures in a particular market area differ substantially from those at a given time in other market areas and change from time to time in the several market areas, the prices in each market area change from time to time independently of price changes in other market areas. Hence, the prices in the several market areas in such Intermountain and West Coast regions have little, if any, relation to each other and are not uniform. They vary from time to time and from market area to market area." (R. 1458.)

1. The Utah Market

The Utah market comprises most of the State of Utah, southern Idaho, and small areas adjacent to Utah in neighboring states. The area is geographically isolated. It is the area covered by the principal Salt Lake City wholesale and retail buyers and the area defined by the circulation of the Salt Lake City newspapers carrying retail food advertising. It is a separate pricing zone for Continental and, with variations, for the other manufacturers. (R. 651, 693, 721, 1192-93; Pl. Exs. 67-74; R. 458, 2509, 2512, 2524, 2527.)

If any brand held any particular consumer loyalty in this market, it was petitioner's "Utah" brand, a name promoted in the Salt Lake market for thirty years and, of course, directed towards local preferences. Throughout the period of this lawsuit the petitioner's Utah and "Frost 'N Flame" labels were the most widely advertised brands in the market. Continental's

"Morton" brand, on the other hand, was one of the least advertised. The following table shows the number of times Utah Pie's brands were advertised in the Utah market and the number of times Continental's brand was advertised:

	1957	1958	1959	1960	1961
Utah Pie	3	27	30	59	76
Continental	13	0	3	1	5

SOURCE: Ex. M-55, M-56; R. 717, 5528, 5539.

Frozen dessert pies were first introduced into the Salt Lake City market around 1955 by Continental and certain other producers with plants located outside the marketing area. By 1957 Continental had built up a fairly substantial volume of these new products, and in late 1957 the Utah Pie Company entered the business. (R. 524, 812, 879.)

Utah Pie, a company owned and run by the Rigby family, had marketed fresh pies under the Utah label for about thirty years. The company suffered a substantial loss in 1957 and late in that year it began producing frozen pies. Utah Pie's entry into the frozen pie business was immediately successful. It transformed a company losing money into a company selling an increasing volume of product and earning increasing profits. In terms of sales volume Utah Pie increased 270 per cent during the four years relevant to this lawsuit, and its dollar volume increased almost 300 per cent from $139,306 in fiscal 1958 to $407,841 in fiscal 1961. Net income before taxes went from a loss of $6,500 in fiscal 1958 to a profit in fiscal year 1961 of $14,000. During the same period salaries, bonuses and other payments to the Rigby family increased by approximately $37,000. (Pl. Ex. 62; R. 437,

2323; Pl. Ex. 92; R. 551, 4586; Pet Ex. A-46; R. 997, 5850.)

Utah Pie immediately achieved, and continued to occupy, a dominant share of the Utah market. The following table measures not only Utah Pie's success, but also the growth of the total market:

Company	Volume in Dozens	% of Market
1958		
Utah Pie	37,969.5	66.5
Continental	754	1.3
Carnation	5,863	10.3
Pet	9,336.5	16.4
Others	3,137	5.5
Totals	57,060.0	100.0
1959		
Utah Pie	38,372	34.3
Continental	3,182	2.9
Carnation	9,625	8.6
Pet	39,639	35.5
Others	20,911	18.7
Totals	111,729	100.0
1960		
Utah Pie	83,894	45.5
Continental	3,350	1.8
Carnation	22,271.5	12.1
Pet	51,480	27.9
Others	23,473.5	12.7
Totals	184,569.0	100.0
1961		
Utah Pie	102,690	45.3
Continental	18,799.5	8.3
Carnation	20,067	8.8
Pet	66,786	29.4
Others	18,565.5	8.2
Totals	226,908	100.0

Source: Pl. Ex. 62; R. 437, 2323.

Utah Pie's growth continued after the complaint period and in 1962 its sales increased another 27,000 dozen. (Ex. M-93; R. 5721 (prepared from Utah Pie's invoices and substituted for the invoices after the trial).) At the same time Continental's volume in 1962 declined to about 30 per cent of its 1961 figure. (R. 217.)

Utah Pie's dominance ". . . came notwithstanding its sales efforts were almost minimal." (R. 1459.) The company had only one young and inexperienced salesman and had no regular advertising or merchandising programs. But its local label was a competitive advantage. (R. 650, 665, 694, 807-08.) Moreover, Utah Pie had the only frozen pie plant in the Salt Lake City market. This resulted in two additional advantages over its competitors: 1) a freight advantage of about 30 cents per dozen over producers located in California; and 2) an ability to deliver from its plant in small quantities. For the large buyers this saved expensive refrigerated warehouse space and inventory expense. (R. 202, 694-95, 713-14.) For small buyers who had no such space Utah Pie was the only possible direct supplier. Utah Pie itself recognized these advantages. (R. 808-09, 879.) Though the company was an extraordinarily inefficient operation,[2] its advantages of location permitted it to adopt, as it did, a policy of consistently underselling its competition. (R. 185, 878-79.) There is no real quarrel with the finding of the Court of Appeals that:

> "Throughout the period here involved, Utah Pie's competitive emphasis was on price and except for

[2] The company produced pies at a rate of 25 per minute; a single Continental production line produced at 120 per minute. (R. 476, 644.)

a comparatively few instances, hereinafter noted, it sold its frozen pies at prices below those of its competitors." (R. 1458.)

The following chart compares Utah Pie's selling prices on its apple pies, the volume leader, with the prices at which Continental made its isolated sales:

APPLE PIE SALES DELIVERED IN UTAH-IDAHO MARKET 1958-1961

	Lowest "Morton" Price	Lowest "Utah" Price	Lowest "Frost 'N Flame" Price
1958			
1st q.	4.94	4.15	
2nd q.	5.16	4.00	
3rd q.	4.98	4.00	
4th q.	4.92	4.00	
1959			
1st q.	4.60	4.00	
2nd q.	4.32	4.00	
3rd q.	no sales	3.70	
4th q.	no sales	3.60	
1960			
1st q.	no sales	3.60	3.00
2nd q.	3.64 *	3.60	3.00
3rd q.	no sales	3.60	3.00
4th q.	3.16	3.60	3.10
1961			
1st q.	3.38	3.60	3.10
2nd q.	2.85	2.75	2.75
3rd q.	2.85	2.75	2.75

* From this point on Continental's pies were 22 ounces; Utah Pie's were always 24 ounces.

(SOURCE: Pl. Ex. 91; R. 551, 4420, 4528;[3] Ex. M-26; R. 634, 5454.)

[3] Pl. Ex. 91 is the same IBM run as Pl. Ex. 4, except organized differently for the print out. The code for Pl. Ex. 91 is the same as for Pl. Ex. 4, and appears at R. 1530.

It should be noted that the prices shown for Continental on this chart include a deduction for what petitioner calls "advertising allowances."[4]

Utah Pie's pricing was not only low, it was also systematically discriminatory. With small buyers as to which it had a virtual monopoly because out-of-market sellers could not compete directly for them, Utah Pie hit the high road with its Utah label. As to the large customers[5] who could buy from Continental, Pet

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[4] Petitioner complains repeatedly about the Court of Appeals' finding that payments to buyers, though not shown on the face of the invoices, nevertheless reflect price reductions. The court was clearly correct; petitioner's argument is pure semantics. If a manufacturer wants to reduce temporarily his price from $4 per dozen to $3 per dozen he does it in one of two ways: 1) he reduces the invoice price (Continental salesmen call this a "temporary price decline"); or, 2) he offers to the buyers a repayment of a dollar a dozen for *every* dozen purchased during the promotional period upon proof of *one* advertisement, no matter what size (Continental calls this a "bill back"). The qualifying ad is uniformly run in the regular Thursday newspaper advertisement published by each chain store. It usually is no more than one or two column inches, and is run in space the store has contracted for anyway. The whole purpose of these short term promotions is to secure volume by permitting the stores to quote a low retail price which they will want to advertise and promote. In states like Utah which require the stores to resell at no less than 6 per cent over their invoice price, the bill back method does not permit a low retail price because the manufacturer's invoice "price" is inaccurately high. (R. 90-91, 161, 191, 221-22, 652-54, 686-87, 698, 716.)

Both the Commission and the courts disagree with petitioner. Payments in excess of the amount actually spent by the customer to perform the advertising are cognizable only under Section 2(a). FTC Guides for Advertising Allowances and Other Merchandising Payments and Services ¶ 11, 1 CCH Trade Reg. Rep., pp. 6072, 6078 (1960); Fred Meyer, Inc. v. FTC, 359 F. 2d 351 (9th Cir. 1966).

[5] The direct buyers in the Salt Lake City market, in the order of their importance, were Associated Grocers, Safeway Stores, and Utah Wholesale, followed by Grand Central Stores, American Food Stores, Grocers Wholesale, and the Associated Grocers branch buying offices in Pocatello and Boise.

and others, Utah Pie hit the low road with consistently discriminatory prices for the same grade and quality pie under its private and controlled labels. (Pl. Ex. 4; R. 67, 1530, 1547-66, 1629-49; Pl. Ex. 91; R. 551, 4420, 4528, 4545, 4547.)

The arrangement with Associated Grocers was the first such consistent and substantial discrimination. Utah Pie sold these pies to Associated Grocers under its wholly-owned Frost 'N Flame label. It was thus a "controlled label" deal. Associated Grocers was the largest buyer in the market, serving 150 to 175 retail stores out of its Salt Lake City headquarters. Beginning in March 1960 and continuing thereafter through the period of this lawsuit Utah Pie discriminated in favor of Associated Grocers to the extent of 50 to 70 cents per dozen—$3.00 and $3.10 on Frost 'N Flame versus $3.60 and $3.70 on Utah brand to non-favored buyers. (R. 212; Pl. Ex. 4; R. 67, 1530, 1547.) Associated Grocers heavily advertised the Frost 'N Flame label, and it quickly replaced Utah as the largest volume brand in the market. (Ex. M-55, M-56; R. 717, 5528, 5539.) Since Utah Pie owned the Frost 'N Flame name, Associated Grocers would have had to abandon the good will built up by its heavy advertising in order to change suppliers. (R. 213, 811.) As found by the Court of Appeals, the arrangement with Associated Grocers "guaranteed Utah Pie's dominant position in the market by foreclosing the largest buyer from effective competition. Frost 'N Flame quickly replaced Utah brand as the leading brand." (R. 1477.)

Throughout the relevant period Utah Pie offered the same discriminatory prices charged on Frost 'N Flame to every large buyer in the market, and in 1961 it began selling to Grand Central-American Stores, another of the four large buyers in the Salt Lake City

market, at these low prices under that chain's private label "Mayfresh." (Ex. M-66, 68; R. 819, 5560, 5562; Ex. M-71; R. 843, 5565; R. 818.)

Utah Pie also produced pumpkin and mince pies for Safeway, the second largest buyer in the Salt Lake City market, under Safeway's "Bel Air" label. (Pl. Ex. 91; R. 551, 4545.) These prices, too, were substantially below the prices charged by Utah Pie to nonfavored competing stores. Utah Pie also continally offered Safeway a preferentially low price on apple, cherry, boysenberry, and peach pies to be packed under the Bel Air label. (R. 818; Ex. M-71; R. 843, 5565.) Utah Pie itself identified its Safeway prices as "rock bottom," quoted to induce Safeway to switch from Pet Milk as its principal supplier. (Ex. M-78; R. 843, 5578.)

The record shows, and the Court of Appeals concurred, that these discriminatory arrangements effectively foreclosed Utah Pie's competitors from substantial segments of the Salt Lake City market. From the time Utah Pie gave Associated Grocers its preferential price on the Frost 'N Flame label, Continental was unable to sell Associated Grocers a single pie. The Mayfresh label deal at American Food Stores cost Continental the only more or less steady customer it had in the market. (Ex. M-26; R. 634, 5454; R. 715.) Over the relevant period there were at least thirteen brands being sold in the Salt Lake City market in addition to those sold by Utah Pie. After the Frost 'N Flame deal began, however, Associated Grocers advertised competing brands only twice in a period of two years. (Ex. M-55, M-56; R. 717, 5528, 5539.)

Continental's volume, market share figures, and number of advertisements obviously compel the conclusion,

reached by the Court of Appeals, that Continental was "a negligible competitor in the Salt Lake City market." (R. 1478.) *Accord,* Petitioner's Brief, App. C. Through 1958, 1959 and 1960 Continental was essentially out of the Salt Lake City market because of its inability to compete with the prices charged by Utah Pie on its Utah label sales and on its controlled and private label sales. Continental even ceased to maintain a sales representative in the market. (R. 655-56.) Continental was, however, continually attempting to reduce its cost of production in order to become competitive in the various markets in the western states. (R. 93-94.) In late 1960 it was successful in working out a co-packing operation in the heart of the California fruit-growing region which permitted fruit to be processed from the trees directly into the finished pie, without the various usual intermediate expenses of handling, warehousing, etc. *Ibid.* By such efforts Continental was able to reduce the cost of manufacturing and delivering apple pies to the Salt Lake City market from $3.75 per dozen in 1958 to $2.80 per dozen by the second quarter of 1961. (Ex. M-22; R. 643, 5450.[6]) With these substantially reduced costs Continental was again in a position to offer its Morton pies to the direct buyers in the Salt Lake City market at prices which it hoped would be competitive. (R. 93.)

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[6] Exhibit M-22 is reproduced as Appendix B to this Brief. Petitioner attacks in vague terms the Court of Appeals' reliance on this exhibit, though it never challenged its accuracy in the trial court. Petitioner's Brief, p. 53. The simple fact is that the chart merely records the manufacturing and delivery costs taken from two uncontested exhibits, Ex. M-1 and M-2; R. 631, 5371, 5404. Ex. M-1 and M-2 also establish the sharply lower costs achieved by Continental on its other varieties, and charted at R. 5451, 5452.

In October 1960 Continental contracted with a Salt Lake City food broker in an effort to resume distribution of its line of Morton frozen food products in the Utah market.[7] (R. 149-50, 657-58.) From November 1960 to June 1961 this broker attempted to sell Continental's frozen pies at various prices by offering various short-term pricing concessions. (R. 159-60, 195-97.) On frozen pies these price concessions ranged from $.50 per dozen off the $4.20 list price on mince pies to $.84 and $.80 off the $4.00 list price on apple, cherry and boysenberry pies. (Ex. M-8; R. 379, 5410-13.) Continental was able to make only a total of seven sales to three of the smaller direct buyers in the outlying areas of Ogden, Pocatello and Boise at these new prices. It could make no sales to the major buyers in Salt Lake City. (R. 195-96, 661-66.) As Utah Pie's salesman admitted on the witness stand, none of the few sales Continental did make during this period affected Utah Pie, and Utah Pie made no price adjustments as a result of Continental's offers. (R. 827, 836.) As stated by the Court of Appeals, "By June of 1961 it seemed apparent that if Continental was to recapture any portion of the market, it had to make better offers." (R. 1480.)

The factors relevant to a determination of what price would be necessary to make any meaningful sales in the market were as follows: As stated, Continental could sell only to the large buyers who had refrigerated storage space. Of these, Associated Grocers was wedded to Utah Pie's Frost 'N Flame brand which it

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[7] Continental's frozen food products, which were marketed under the Morton name, were not limited to the six varieties of frozen dessert pies involved in this case. Also included in the line were frozen dinners, frozen pot pies, frozen cream pies, etc.

was buying at $3.10 per dozen. Grand Central was about to close a deal, which it soon did, with Utah Pie on its own private label Mayfresh to be supplied at the same low price. (R. 167-68, 818; Pl. Ex. 91; R. 551, 4420, 4547.) Safeway was buying almost exclusively from Pet Milk, from whom it could purchase three brands, including its own private label, in combined truckload shipments. (R. 167-99, 681-82.)

Confronted with this situation and the fact of his proven inability to sell at higher prices, Continental's broker recommended that Continental meet the price being charged to Associated Grocers and offered to the other large buyers by offering apple pies at $2.85 per dozen, delivered in truckload quantities. (R. 201.) This was the ounce-for-ounce equivalent of Utah Pie's $3.10 delivered price on its heavier pie,[8] except that Utah Pie's price was available on any quantity shipment. (R. 229.)

Continental approved its broker's recommendation and a delivered price of $2.85-$2.89, depending on quantity ordered, was offered for a two-week period to those buyers potentially able to buy from Continental. At the same time Continental, as it was then doing in other western markets served by the California plant, offered to buyers in the Utah market a freight allow-

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[8] Utah Pie's 24 ounce product was priced at 1.07 cents per ounce. At its new temporary price Continental's 22 ounce product was 1.08 cents. For every professional buyer in the Salt Lake market who testified this was the relevant consideration. (R. 220, 693, 712, 732.) Petitioner's salesman admitted, and the Court of Appeals found, that a smaller pie such as Continental's had to be priced under a larger pie such as petitioner's in order to achieve substantial sales. (R. 802, 823, 825, 1481.)

ance of 30 cents per dozen if the buyer took delivery in California. (R. 663.)[9]

Thus, for the last two weeks in June 1961 Continental's truckload offering prices on 22-ounce apple pies in Salt Lake City were $2.85 delivered and $2.55 California plant. At these prices Continental made sales to American Food Stores in Ogden and to the small independent office of Associated Grocers in Pocatello, both of which had previously purchased some Morton pies and were not purchasing from Utah Pie. (R. 207, 737-38; Pl. Ex. 91; R. 551, 4420.) Of the Salt Lake City buyers, only Safeway Stores and Grocers Wholesale, neither of which was a significant buyer from Utah Pie, placed orders with Continental.[10] Safeway bought about three weeks' supply (R. 695-96); Grocers Wholesale bought one-sixth as much. (Ex. M-26; R. 634, 5454, 5458.) To make these purchases Safeway had to clear its warehouse of Pet's Swiss Miss pies. (R. 205-06, 207.)

Utah Pie responded to Continental's two-week offer by immediately reducing the prices on all of its 24-ounce apple pies, whatever the brand name, to $2.75

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[9] From time to time in this litigation petitioner has argued that this $2.55 price was a delivered in Salt Lake City price. Petitioner's present position is ambiguous. Compare Petitioner's Brief, p. 47 with Petitioner's Brief, p. 48. Outside of a few typographical errors on invoices, there is no support for the argument, and the testimony of the actual buyers consistently refutes it. (R. 165-166, 225-226, 700, 723.) Moreover, petitioner's own salesman admitted the obvious fact that the $2.55 price was f.o.b. California. (R. 828.)

[10] Safeway had been making one small purchase a month and on the strength of this the Court of Appeals viewed Safeway as a Utah Pie customer. (Pl. Ex. 91; R. 551, 4420, 4440.) In fact Safeway was being supplied almost entirely by Pet. (R. 695.)

per dozen, and offering to all customers unlimited quantities delivered in lots of any size. (R. 828-30.) No buyer who testified knew of any reason why this price cut was competitively necessary. (R. 708-09, 736.) (Utah Pie extended the same price cut to its one customer in the Spokane market though no one has ever contended that Continental's two-week promotional offer was offered in that market.) When the merchandising manager for Safeway Stores learned that Utah Pie was offering its larger pie for 10 cents less per dozen than Continental, with of course no requirements as to amounts to be delivered, he urged Continental to further reduce its own price on the order which Safeway had already placed. Continental refused, and instead agreed to let Safeway cancel its order. (R. 204-06.) Continental also offered to cancel the order placed by American Food Stores in Ogden rather than reduce its price further. (R. 205, 723.)

Continental's two-week offer was renewed once effective July 31 for another two-week period, but no sales were achieved since the price was no longer competitive. (Pl. Ex. 16; R. 113, 2062, 2067.) On September 8, 1961, the complaint in this action was filed.

At the trial Utah Pie conceded that prior to June of 1961 Continental had never caused it to reduce any of its prices. (R. 827, 836.) Utah Pie's Salt Lake case rests entirely upon the few sales made by Continental in June and July 1961, and petitioner's Brief, pp. 44-48, concedes as much. Yet Utah Pie never produced any buyer to testify that that buyer had switched his trade from Utah Pie to Continental, and the actual buyers who purchased from Continental denied such an effect. (R. 695, 739.) Nor did Utah Pie make any effort to prove any loss of profits by reason of its June

1961 price reduction, which resulted in a greatly increased volume of sales made at profitable prices.

2. The Other Markets

The Court of Appeals accurately found that Utah Pie's sales efforts in other markets were "almost minimal." (R. 1459.) The company had but one salesman and it maintained no sales force or broker-representative in any of the outlying markets.

Spokane, Seattle and Portland Markets. The trial court permitted petitioner to place into evidence a damage exhibit claiming sales lost to Continental in the Spokane, Seattle and Portland markets in the year 1959. But petitioner's testimony was that its first sales effort in any of these markets did not occur until 1960. (R. 542.) This selling effort, as described by petitioner's salesman, consisted of one automobile trip through Washington and Oregon in January 1960, and the sending of one truckload of pies, apparently early in 1961, "on speculation . . . into Portland, Oregon, where this broker—or, he had a room there, he paid the storage on them, and we tried to sell pies." (R. 538.) On cross-examination petitioner's salesman testified that the "broker" in Portland represented petitioner "until circumstances disrupted the program." (R. 782.) No further explanation was given.[11]

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[11] It was not until this action was in the Court of Appeals that Continental learned in the course of a deposition taken in succeeding litigation that Utah Pie's Portland "broker" had actually sold the pies sent to him "on speculation" and had, without informing petitioner, pocketed the money. The last reported sale through this "broker" was in August, 1961. At the time of the deposition petitioner's salesman could not remember whether he was aware of these facts when he testified at the earlier trial in February 1963.

Petitioner's only significant sales in any of the markets in the Pacific Northwest occurred in Spokane.[12] All of these were to one customer under another of petitioner's discriminatory private label deals. Beginning early in February 1960 petitioner began selling one of the major buyers in the Spokane market a "Sonny Boy" label. Apple was priced at $2.88 per dozen, which was even less than petitioner was then charging on its Frost 'N Flame to Associated Grocers in Salt Lake City. (R. 784; Pl. Ex. 91; R. 551, 4420, 4567-72.) Petitioner's prices in Spokane were considerably below any Continental prices there, or in Seattle or Portland. See, *e.g.*, Petitioner's Brief, App. C.

In none of these three separate markets was there a shred of evidence suggesting competition had been in any way lessened or threatened, and petitioner does not now contend otherwise.

The most remarkable thing about the Seattle, Portland and Spokane markets is not, however, the hopeless insufficiency of the facts to sustain the verdict but is, instead, how these markets have fared in the vague and waffling claims thrown out by petitioner as this case has progressed.[13] Petitioner is now apparently suggesting (Brief, App. C) that Continental injured it by discriminating between Denver as a low price market and the three northwest cities as the high-

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[12] The record shows a few sales made in Portland by the "broker", M. C. Scott (customer #48, Pl. Ex. 91; R. 551, 4565-66) during the early months of 1961.

[13] At R. 1452 the Court of Appeals observes that "Throughout the proceedings Utah Pie shifted from theory to theory as to the basis of its claim of § 2(a) violations." At that intermediate level of the federal judiciary petitioner was by no means finished with these innovations.

priced markets. Any such claim would be flatly inconsistent with the trial court's pretrial order, the claim stated in Utah Pie's opening statement to the jury, the damage evidence introduced by Utah Pie, and the trial court's injunctive decree (R. 34, 47-48, 64), and also inconsistent with petitioner's argument in the Court of Appeals. See, *e.g.*, Brief of Appellee, Dkt. 7306, p. 19:

> "5. Continental's Discriminatory Low Prices in . . . the Pacific Northwest Were Predatory in Intent and Were Aimed Directly at Plaintiff."

Having secured a verdict which Utah Pie itself argues was in part based upon a claim that Continental had sold in Seattle, Spokane and Portland at unlawfully low discriminatory prices, Petitioner's Brief, pp. 49-50, Utah Pie cannot now ask this Court to affirm the judgment of the trial court on the ground that Continental's prices in these markets were high and its Denver prices low.

The Denver Market. Exactly the same ambivalence underlies petitioner's present Denver claim. The complaint alleged low prices "in the State of Utah" and high prices in the "neighboring states." (R. 19.) It also alleged that defendants would lessen competition, etc., "in the State of Utah." (R. 18.) When plaintiff was asked during discovery to name its alleged lost business, it named only three customers in the Utah market and none in Denver. (R. 21.) Plaintiff's unbridled discovery produced no proof of its charges. A pretrial order was thereupon framed to allege low prices in Washington, Oregon, Wyoming and Colorado, as well as in Utah-Idaho, and high prices "in another area" (nowhere defined) (R. 34), and three weeks before trial the earlier answer to Interrogatory was changed

to allege a lost customer in Denver. However, in the opening statement Utah Pie's counsel claimed he would prove the defendants' prices

> "were higher in other areas than they were in the Salt Lake area . . . the evidence will prove this price difference, this price difference had the low level price in the Salt Lake area. That involves Idaho, Montana, Wyoming, Washington, and Oregon. That's the area in which this little Salt Lake company traded. But the low leg of this price was in the Salt Lake trading area, and the high leg of this price was principally in the eastern United States and in California." (R. 64.)

The omission in this statement of Colorado as a "low price" area in which Utah Pie was trying to sell was not inadvertent. On the first day of trial petitioner tried to prove that prices in the western states were lower by comparing Continental's prices for half dozens in the west against full dozen prices in the east. (R. 75-76.) Denver prices are quoted on the eastern price list; Utah and other states west of the Rocky Mountains are on the western price list. (Pl. Ex. 8, 9; R. 74, 75, 2049, 2050.) When this tactic was exposed, petitioner's claim came back to Denver being allegedly a low price market, and petitioner's lone salesman was put on to construct a case in the Denver market. (R. 531-36.) Continental objected to this substantial addition to the initial claims right in the middle of the trial, but was overruled. (R. 532-33.)

With respect to the Denver market the entire evidence was as follows: Petitioner's salesman testified that in 1959 he made "two or three trips into Colorado trying to sell pies." (R. 531.) Later in 1959 Utah Pie hired a Denver broker but "he couldn't sell anything for us, so we let him go." *Ibid.* Still later in the same

year petitioner's salesman returned to Denver and after talking to various buyers "was able to convince H. A. Marr to buy some frozen pies from us, convinced them that our pie was of good quality, and the price was comparable—was right." *Ibid.* Following this one sale of pumpkin and mince frozen pies, petitioner's salesman testified that he made "repeated trips" to Colorado, talked to the buyers and did not receive any orders. (R. 535.)

Petitioner produced as witnesses neither its "broker" nor any customer that it ever claimed to have had or to have lost in Denver (or indeed anywhere else). The sole witness who knew anything about the Denver market was produced by Continental, one Mr. Doil Smith. Mr. Smith was a professional buyer for one of the Denver chains and had bought the pumpkin and mince pies from petitioner in the fall of 1959. He thus accounted for the only substantial sales ever made by Utah Pie in the Denver market.[14] Mr. Smith's

[14] At p. 13 of its Brief Utah Pie has constructed a chart intended to show a substantial percentage of its sales having been made outside the Utah-Idaho market. Nearly all of these sales, however, are accounted for by its private label deal with one buyer in Spokane and the sales of pumpkin and mince to Smith in the fall of 1959 (half of which appears in petitioner's "Fiscal 1960"). The "Spokane" sales were in fact simply to a Spokane buyer picking up at the plant in Salt Lake City. The chart is not evidence of any sustained selling effort outside Utah and Idaho. If one eliminates these two transactions, the percentage of petitioner's sales of all its flavors outside of the Utah market on a calender year basis was as follows:

1958—3.3%
1959—4.5%
1960—1.1%
1961—2.8%

Source: Pl. Ex. 82; R. 527, 3616; Pl. Ex. 91; R. 551, 4420, 4567, 4574-75.

testimony was in no way refuted or even challenged by Utah Pie either in the trial court or on appeal. And, of course, if Smith's impartial testimony as to market facts is to be totally disregarded, the record becomes simply barren altogether on the Denver market.

When Mr. Smith purchased pumpkin and mince pies from appellee in 1959 he did so because the price was lower than that quoted him by any other seller. "Denver hadn't heard of" these prices. (R. 761.) Mr. Smith's chain had trouble selling petitioner's pies, and didn't buy any for the 1960 holiday season. (R. 744.) By the 1960 season the Denver market had become much more competitive so that petitioner's price was no longer the lowest. (R. 745.) Both the name and the quality of petitioner's product were unknown in Denver. (R. 760.) Continental's price did not cause Mr. Smith to reject petitioner's product. (R. 745.) In fact, petitioner never even offered Mr. Smith frozen fruit pies in flavors other than pumpkin and mince. (R. 744.)

Continental was not the only competitor in Denver. In 1960 there were about fifteen competing brands. (R. 745, 751.) Since 1960 the increase in the number of competitive brands in Denver has been "tremendous." (R. 747.) All the real competitors in Denver maintain their own local selling agencies in order to make constant calls on buyers and to keep abreast of changing marketing conditions. Petitioner never did so. Petitioner further admitted that when it offered private label pies to Miller's Supermarkets in Denver, it was not Continental's price that kept petitioner out, but its own failure to bother calling on the organization's headquarters in Chicago where such buying decisions were made. (R. 781.) Indeed, Utah Pie admitted that

it never tried to get any private label accounts in Denver. (R. 780.)

Since in the Denver market, as in the Salt Lake City market, the only buyer who testified flatly denied Utah Pie's claim that Continental had been responsible for causing Utah Pie any damage, petitioner sought to prove injury to itself through the "opinion" testimony of its one salesman that over the years 1959, 1960 and 1961 Utah Pie lost sales of over 230,000 dozens to unnamed Denver buyers because of the "pricing activities" of the three defendants. (R. 562.) This was incompetent and hearsay testimony. Moreover, even on its face it had nothing to do with actual sales by Continental in the Denver market at allegedly discriminatory prices, and this was admitted by the witness.[15]

III. The Instructions to the Jury

The foregoing facts are, as the Court of Appeals noted, substantially undisputed. (R. 1454.) That court concluded, in an opinion which shows a careful and considered scrutiny of the record, that these facts do not establish the ultimate fact of a violation of the Robinson-Patman Act. To the extent the jury's verdict could be said to be contrary, it was completely vitiated by inadequate and erroneous instructions on the meaning in law of the two principal issues in the case.

The statutory language "substantially to lessen competition or tend to create a monopoly" by itself means next to nothing. It has, of course, been construed in the cases and Continental requested that these judicial

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[15] (R. 564-65.) Indeed, the losses claimed in 1961 alone exceeded Continental's total sales in Denver in that year. (Pl. Ex. 80; R. 536-37, 3355.)

constructions, where relevant, be explained to the jury. Thus, the trial court was asked to instruct that the Act's emphasis is on competition generally and not on the welfare of a particular competitor; that the Act is not intended to prevent mere shifts of business among competitors; and that it is not concerned with trivial and sporadic effects and temporary gains and losses. (R. 1428-32.) See, *e.g.*, *Anheuser-Busch, Inc.* v. *FTC*, 289 F.2d 835 (7th Cir. 1961); *Atlas Bldg. Prods. Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843; *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991; *Minneapolis-Honeywell Regulator Co.* v. *FTC*, 191 F. 2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206. The trial court denied all these requests and instead simply repeated the statutory language six times (R. 1353, 1355, 1361, 1364, 1398), and then concluded with the legally erroneous charge that the test is satisfied if the alleged price differences presented the probability "of depriving plaintiff of sales or forcing his prices down." (R. 1399.)

The same approach pervaded the instructions on the meeting competition issue. Again, Continental asked for instructions gleaned from the cases which would have explained to the jury the practical, *ad hoc* interpretation of the defense which has been adopted by the courts and the Federal Trade Commission. (R. 1433-35.) See, *e.g.*, *Forster Mfg. Co.* v. *FTC*, 335 F. 2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 902; *Sunshine Biscuits, Inc.* v. *FTC*, 306 F. 2d 48 (7th Cir. 1962); *Continental Baking Co.*, 1963-65 Trade Reg. Rep. Trans. Binder ¶ 16,720 (1963). However, instead of telling the jury what the defense is, the trial court in-

structed at great length as to what it is not. For instance, the jury was told the defense is not available if the seller knows he is meeting an unlawful price (Continental only claimed it was meeting Utah Pie's price); that it is not available if the price quoted turns out to be lower than was in fact necessary; that it is not available if the seller made plans to sell at a loss; that it is not available if the lower price merely might contribute to the seller's overall profits; and that it is not available if the lower price was given as part of the seller's pricing system. (R. 1356-57, 1364-65.)

Most of these instructions were legally erroneous and wholly irrelevant to the case against Continental. Especially when coupled with the confusing number of parties and claims which the jury was expected to sift out, they effectively vitiate the verdict.

SUMMARY OF ARGUMENT

In none of the markets were there facts sufficient to go to the jury. The trial court erred in denying Continental's motion for directed verdict and in denying its post-verdict motion for judgment. The case went to the jury on the theory there was sufficient evidence of a primary level Robinson-Patman Act violation in the Utah market. In this the trial court was plainly wrong, as the Court of Appeals held. Under the most comprehensive view of the Robinson-Patman Act, the statute cannot be construed to proscribe the two two-week promotional offers by a marginal seller that this record establishes to be the sum and substance of the case against Continental. *American Oil Co.* v. *FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954; *Anheuser-Busch, Inc.* v. *FTC*, 289 F.2d 835 (7th Cir. 1961); *Dean Milk Co.*, FTC Dkt. 8032 (Oct. 22, 1965).

Moreover, even if such short-term promotions by a marginal seller could theoretically somehow "substantially lessen competition or tend to create a monopoly," it is perfectly clear that the Court of Appeals was correct in holding that this record contains no facts upon which to base such a projection. There was no proof that competition generally had been lessened in the Salt Lake City market and certainly no proof that Continental had caused any lessening. Moreover, not only was there no proof that Utah Pie had been injured, but the proof was all directly contrary. By every indicium of growth and success Utah Pie was an appreciably stronger and more successful company at the time of the complaint, and at the time of trial, than it had been in preceding years.

Tacitly recognizing that the Utah market charge, which alone had been alleged in the complaint and, after much intermediate shifting about, alone sent to the jury, was not substantiated by the record, Utah Pie again shifted its claims and contended in the Court of Appeals that the judgment could be supported by evidence relating to Denver. The Court of Appeals properly held that no such claim had ever been passed upon by the jury and rejected this last-minute switch. The Court of Appeals was also properly of the opinion that petitioner's evidence of injury in the Denver market was insufficient and, had it reached the question, the Court of Appeals would have been further compelled to hold that the evidence was insufficient to show any likelihood of injury to competition generally in the Denver market. Petitioner offered no proof on Denver other than the fact that it had sold two truckloads of pies there in 1959 and that Continental's prices in Denver had declined over the years.

The record is barren of any evidence of a lessening of competition in Denver, let alone that Continental caused any. Moreover, petitioner offered no competent proof that it had been injured in Denver and indeed the only factual testimony was flatly contrary.

The Court of Appeals obviously intended to preclude any further trial proceedings, and clearly had the power to do so. 28 U.S.C. § 2106 (1964); *New York, N.H. & H.R.R.* v. *Henagan,* 364 U.S. 441; *Bryan* v. *United States,* 338 U.S. 552; *Baltimore & C. Line* v. *Redman,* 295 U.S. 654. In denying a new trial the Court of Appeals did not abuse its discretionary authority. Petitioner never asked for a new trial either in the trial court or in the Court of Appeals though it had adequate notice of the grounds upon which the appeals court was asked to decide the case. Petitioner avoided sending to the jury the Denver claim on which it now wants a new trial. Moreover, a second trial would be a futile gesture since the facts of record on Denver are insufficient to sustain a verdict, and Utah Pie does not assert that it now has additional facts which it desires to show.

There is no reason for this Court to disturb the Court of Appeals' rulings either on the merits or on the new trial question. It carefully analyzed the facts in rejecting petitioner's case on its merits. Quite clearly, in denying a new trial that, without adequate excuse, was never requested, the Court of Appeals did not abuse its discretion.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE EVIDENCE FAILED TO SUPPORT THE CLAIM SUBMITTED TO THE JURY

The Court of Appeals concluded that on the evidence, which it rightly termed "free from substantial dispute," Utah Pie failed to prove its case against Continental. (R. 1454.) In so holding the Court of Appeals reached the only conclusion possible on the facts and on the law.

A. The Case Submitted to the Jury Rests Entirely Upon Continental's Promotional Effort in the Utah Market in June 1961

From 1958 through 1960 Continental was effectively shut out of the Utah market. Any decline in prices Utah Pie may have experienced over these years had nothing to do with Continental, and Utah Pie's "damage witness"—its lone salesman—so testified (R. 827, 836). Petitioner's Brief, at pages 44 through 48, makes clear that its entire case against Continental in the Utah market rests upon Continental's brief promotional effort in June of 1961.

Utah Pie now seeks to avoid the obvious legal deficiency of the judgment by arguing that the judgment may be affirmed on the basis of its claims relating to the Denver market. We review below the insufficiency of the evidence to establish this claim and here point out simply that the Court of Appeals was correct in holding that petitioner's reliance on the Denver market "is a theory clearly not submitted to the jury by the court in its charge, nor passed on by the jury." (R. 1505.)

There were two charges to the jury, the second in response to a particular inquiry concerning the meet-

ing competition defense. At the outset of its first charge the court told the jury that in addition to the conspiracy charge, "plaintiff also claims that each defendant individually violated Section 2(a) of the Clayton Act by charging different prices in the Salt Lake trading area than each charged in other areas . . . ." (R. 1346-47.) Throughout the rest of the main charge "Utah," "Utah area," and "Utah trading area" were used to define the market seventeen times; and "Salt Lake City market" and "Salt Lake City area" three times. (R. 1348-71.) The court obviously intended that these various expressions be understood to mean the same thing. (R. 1386.) Denver was never mentioned.

During its deliberations the jury asked whether a price was unlawful in Salt Lake which was lower than the Los Angeles market prices but which did not undercut competitors' prices. (R. 1448.) In its response the court defined the market as "Salt Lake" or "Salt Lake City" no less than sixteen times. (R. 1397-99.) Petitioner also never objected to any of these definitions of its case.

The form of verdict recited that Continental had "discriminated in the prices which it has charged for frozen pies in the Utah trading area and the prices which it has charged for frozen pies elsewhere . . . ." (R. 41, 1405.)

The fact that it was necessary to argue the Denver claim to the jury on closing arguments does not affect the correctness of the Court of Appeals' holding. Contrary to Rule 57 of the Federal Rules of Civil Procedure, Continental's counsel were not adequately informed what the charge would be prior to the closing

arguments. The off and on nature of the Denver case, reviewed above, made it impossible at that point to tell where the Denver case was. Since petitioner's counsel referred to Denver, it was necessary to do the same in response.[16]

In truth, then, the trial court's judgment rests entirely upon the sales made by Continental as a result of its two-week promotion on apple pies[17] in the summer of 1961 in the Utah market. The Court of Appeals held that there was no sufficient evidence that this short-lived promotional pricing by a company seeking reentry into the market had injured, or might injure, competition within the meaning of the Robinson-Patman Act. For it to have ruled otherwise the Court of Appeals would have had to hold contrary to all existing authority.

B. Occasional Short-Term Promotions by a Marginal Seller Are Not Proscribed by Section 2(a) of the Robinson-Patman Act

The judgment of the trial court is a classic example of the potential conflict between the nation's overall antitrust objectives as expressed in the Sherman Act, and the potentially restrictive Robinson-Patman Act. The district court was of the opinion, as he charged the jury in his instructions, that Utah Pie had carried

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[16] The references to petitioner's closing argument do not establish what went to the jury. Petitioner's Brief, pp. 122-23. If it were otherwise, it would also be necessary to cite counsel's various statements during closing argument that what Utah Pie was complaining about was Salt Lake prices. (See, *e.g.*, R. 1231, 1235, 1239.) "And yet you have that same pattern . . . . The high leg of their price in California, where their plant is, the low leg of their price in Salt Lake City." (R. 1239.)

[17] Only one of the six flavors marketed by Utah Pie.

its burden of proving a reasonable likelihood of a substantial injury to competition if the alleged price differences "might have the reasonable probability of depriving plaintiff of sales or of forcing his prices down." (R. 1399.) That this was indeed the trial court's understanding of the law is further shown by its peremptory rulings on the sufficiency of the evidence and by its stated view that its injunctive decree flatly prohibiting all price differences only required Continental "to abide by the law." (R. 1412.)

There is, thankfully, no judicial or legislative authority which even suggests that the Robinson-Patman Act restricts the type of competitive efforts which the trial court adjudged illegal. Sales at differing prices in unrelated markets are not, without more, unlawful. The statute requires proof that such sales may injure, or have injured, competition, and in some significant manner. What the trial court did in denying Continental's motion for judgment was to "raise the specter of a flat prohibition of price differentials" which this Court warned against in *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 553.

A reading of Utah Pie's Brief would suggest that neither the courts nor the Federal Trade Commission have ever passed on the legality of short-term price reductions under the Robinson-Patman Act. Of the few area price discrimination cases mentioned in its Brief, Utah Pie places principal reliance upon *Maryland Baking Co.* v. *FTC*, 243 F.2d 716 (4th Cir. 1957), a case in which the local price reduction was in effect for a period of four years, "was initiated for the purpose of driving . . . out of business" the only competitor, and resulted in a loss by that competitor of "about half its volume of business in the product

in question." (*Id.* at 718.) In addition Utah Pie relies upon *Samuel H. Moss, Inc.* v. *FTC*, 148 F.2d 378 (2d Cir. 1945), *cert. denied*, 326 U.S. 734, *modified*, 155 F.2d 1016 (2d Cir. 1946), which laid down an aberrational doctrine that once a price difference is shown the burden shifts to defendant to show it will not injure competition. This doctrine has been repudiated by the Federal Trade Commission and every court of appeals having had occasion to consider it. *General Foods Corp.*, 52 F.T.C. 798 (1956); see generally Rowe, *Price Discrimination Under the Robinson-Patman Act*, 108-11 (1962).

The rest of Utah Pie's "authority" for the judgment of the district court consists of decisions involving horizontal and vertical mergers, joint ventures, tying arrangements, requirements contracts, exclusive dealing arrangements, and just about every other Sherman or Clayton Act issue except short-term area price differentials.[18] No foreclosure of competition results from the mere fact of different prices in unrelated markets, and it is this distinction, among others, which makes the cases dealing with the various types of restraints under other provisions of the Sherman and Clayton Acts inapplicable to a case such as this one. The very fact of these various arrangements results in foreclosure of competition to some degree or other. The mere fact of price differences in unrelated markets does not suggest foreclosure and, indeed, the price

[18] Its reliance upon Brown Shoe Co. v. United States, 370 U.S. 294, for the proposition that the factual standards of illegality are the same in all Clayton Act cases is odd since it was in *Brown Shoe* that the Court pointed out at some length that Section 3 of the Clayton Act alone requires the application of varying standards depending on the kind of exclusive dealing arrangement involved. See 370 U.S. at 329-31.

volatility and lack of price uniformity shown in this case are the very hallmarks of competition.

The case before this Court is also fundamentally different even from the Robinson-Patman Act cases where the discrimination complained of is between two purchasers competing in the resale of the item purchased —the so-called "secondary level" cases. Where one such purchaser receives a lower price from a seller than does his competitor it is usually fairly inferable that he will have a significant competitive advantage over his non-favored competitor. See, *e.g., FTC* v. *Morton Salt Co.,* 334 U.S. 37. Where, as here, the discrimination alleged is between wholly unrelated markets and noncompeting purchasers, the secondary line cases are inapplicable. Both the Commission and the courts have recognized that to apply secondary line formulations to primary line cases would be flatly inconsistent with the congressional antitrust objective of fostering competition. See, *e.g., Dean Milk Co.,* FTC Dkt. 8032 (Oct. 22, 1965); *The Borden Co.,* FTC Dkt. 7474 (Feb. 26, 1964), *rev'd on other grounds,* 339 F.2d 953 (7th Cir. 1964); *Anheuser-Busch, Inc.* v. *FTC,* 289 F.2d 835, 840 (7th Cir. 1961); *Balian Ice Cream Co.* v. *Arden Farms Co.,* 231 F.2d 356, 367 (9th Cir. 1955), *cert. denied,* 350 U.S. 991.

Indeed, even in secondary line cases, a two-week price difference has been held incapable of establishing the requisite possibility of injury to competition. *American Oil Co.* v. *FTC,* 325 F.2d 101 (7th Cir. 1963), *cert. denied,* 377 U.S. 954. There American maintained a substantial (*i.e.,* 11.5 cents per gallon at its peak) seventeen-day price difference among competing retailers. The Court of Appeals held there had been no violation of the statute, for to satisfy the statutory test ". . .

there must be something more than an essentially temporary minimal impact on competition . . . ." *Accord, Minneapolis-Honeywell Regulator Co.* v. *FTC,* 191 F. 2d 786 (7th Cir. 1951), *cert. dismissed,* 344 U.S. 206.

Temporary price reductions alleged to injure competition at the primary level have also been before the courts of appeals. The first of these was *Anheuser-Busch, Inc.* v. *FTC, supra,* where the Court of Appeals held that a fourteen-month localized price reduction of up to twenty per cent was not unlawful even though the effect was to increase the market share of the nation's largest selling beer from 12 to 39.3 per cent in the market involved.

More recently, in the *Borden* case, *supra,* the Commission staff attacked a series of short term area price reductions in various localities in Indiana and Michigan. At various times an Indiana plant of Borden was found to have charged prices as low as 26.3 cents per half gallon of milk in one community while at the same time charging prices up to 39 cents per half gallon in a nearby community. In another instance Borden had instituted price reductions in one community from 32.3 cents down to 22.2 cents and finally to 9.2 cents per half gallon in order to permit its one retail customer to meet the loss leader selling of a locally dominant retail competitor. In this latter instance Borden's wholesale competitors maintained their usual prices with the result that their sales declined to zero during the period of the low price, and they experienced a permanent loss of certain customers. *The Borden Co.,* FTC Dkt. 7474 (Oct. 8, 1962) (Initial Decision 9-10). The Commission dismissed the complaint as to all but this one community where, over the dissent of Commissioner Elman, a two-man majority found evidence of a likelihood of a substantial

lessening of competition. Commissioner Elman could see nothing in the record to suggest that Borden "was doing anything more than reacting to the fluctuations of the market, and thus engaging in just such competitive conduct that federal antitrust policy seeks to foster. Standing alone, respondent's week of below-cost selling surely does not indicate a course of conduct calculated to injure rivals and harm competition generally." *The Borden Co.*, FTC Dkt. 7474 (Feb. 7, 1964) (Dissenting Op. 8).

The Court of Appeals for the Seventh Circuit agreed with the analysis of the dissenting Commissioner and held that a brief, temporary price reduction made in response to local competitive conditions could not as a matter of law have the substantial adverse effect upon competition required by the statute. *Borden Co.* v. *FTC*, 339 F.2d 953 (7th Cir. 1964).

In cases other than *Borden* the Commission itself has consistently dismissed complaints involving allegations of primary level injury where the facts have shown, as they do here, only temporary or sporadic price reductions. *International Milling Co.*, Dkt. 7136 (Nov. 6, 1963) (eight-week price reduction of up to one-third of the normal selling price and causing a nearly one hundred per cent increase in respondent's sales in the area affected not unlawful); *Sperry-Rand Corp.*, Dkt. 7559, p. 1 (Feb. 17, 1964) (sales of 45,000 typewriters to Sears, Roebuck at a low discriminatory price not unlawful because "the effects on competition of this single incident appear too insubstantial"); *Uarco, Inc.*, Dkt. 7087 (Feb. 24, 1964) (sporadic discriminatory sales to six customers not unlawful even though they ousted respondent's competitors from this business); *Quaker Oats Co.*, Dkt. 8112 (Nov. 18, 1964) (sporadic sales of oat flour to the nation's largest con-

sumer at discriminatory prices not unlawful though they resulted in a diversion of substantial sales volume to respondent); *Dean Milk Co.*, Dkt. 8032 (Oct. 22, 1965) (lower prices maintained for four-month period in a market in which respondent was a new entrant not unlawful even though respondent's prices were lower than its local competitors and below cost, and one of the local competitors lost substantial sales to respondent and subsequently went out of business).

In the *Dean* case the Commission majority stated the results of what clearly was an extensive re-thinking of its position on the applicable standards for determining competitive injury in primary line price discrimination cases. The majority opinion stated:

> "It is the Commission's opinion that a finding of possible substantial competitive injury on the seller level is warranted in the absence of predation where the evidence shows significant diversion of business from the discriminator's competitors to the discriminator or diminishing profits to competitors resulting either from the diversion of business or from the necessity of meeting the discriminator's lower prices, provided that these immediate actual effects portend either a financial crippling of those competitors, a possibility of an anticompetitive concentration of business in larger sellers, or a significant reduction in the number of sellers in the market." *Dean Milk Co., supra* at 11.

Concurring in the Commission's decision on this point, Commissioner Elman emphasized that

> "the intended, foreseeable, and actual result of Dean's price tactics was to increase competition in Lexington by enabling Dean's entry as a significant new competitor. * * * [A]n interpretation of the price discrimination law which blocked it from penetrating into new markets would surely be indefensible. As I mentioned earlier,

we must heed the Supreme Court's admonition, in *Automatic Canteen Co.* v. *FTC,* 346 U.S. 61, 74, that the price discrimination law must be so interpreted and applied as to support, not frustrate, the basic policies of the antitrust laws—to promote competition and prevent monopoly." (pp. 25, 27)[19]

C. On the Undisputed Facts Continental's Brief Price Reduction Was Incapable of Causing Competitive Injury

Even if such a short-term price quotation as this case presents could theoretically have the substantive effects upon competition defined by the statute, the Court of Appeals correctly found in this case that there was no evidence of any such effects. Utah Pie tried the case on the theory that injury to itself was injury to competition generally.[20] It is not necessary here to pass upon this extremely dubious legal theory. See, *e.g., Anheuser-Busch, Inc.* v. *F.T.C.,* 289 F.2d 835 (7th Cir. 1961); *Balian Ice Cream Co.* v. *Arden Farms Co.,* 231 F.2d 356 (9th Cir. 1955), *cert. denied,* 350 U.S. 991; *Purex Corp.,* 51 F.T.C. 100 (1954). For in June and July of 1961 Utah Pie's sales approached their all-time high; its dollar sales for the year 1961 in-

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[19] The commentators are in accord with the view that temporary, promotional price reductions are sanctioned by the statute, and can be found illegal only at the expense of barring new entries into local markets. See, *e.g.,* Note, 74 Harv. L. Rev. 1597, 1603, 1610 (1961); *cf.* Report of the Attorney General's Committee to Study the Antitrust Laws, 332, 336 (1955). Compare Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 65, 74 (1958).

[20] In its Brief at pp. 78-80 Utah Pie—holder of 45 per cent of the business in the Utah-Idaho market and perpetrator of sustained and substantial secondary level discriminations—attacks the Court of Appeals for ignoring the "trend toward concentration" in the market. The "dwindling handful" of sellers who were actually able to sell in Salt Lake City in fact numbered seven in 1958, seven in 1959, nine in 1960, and eight in 1961. (R. 1081.)

creased by 25 per cent over 1960; its net worth increased by 33 per cent; the bonuses and salaries paid to its owners increased by 33 per cent; its profits after payment of these salaries and bonuses increased substantially; and Utah Pie continued in 1961 to hold a dominant 45 per cent of a growing market. In 1962 Utah Pie's sales continued to increase sharply throughout the year, and by year-end the company had sold 27,000 dozen more frozen fruit pies than it had sold in its record year, 1961. *Supra,* pp. 8-10.

Moreover, the circumstances surrounding the few sales made by Continental at its reduced price completely negate any inference that Continental had set out on a path that might prove destructive of any competitor in the Utah market.

First of all, its price did not undercut the prices then being offered and charged in the market. At the time of Continental's two-week offer Utah Pie was charging an equivalent price on the largest selling brand in the market and was also offering this price to all large buyers such as Safeway and Grand Central. *Supra,* pp. 13-14, 16-17.[21]

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[21] Utah Pie has argued in the Court of Appeals, and again here, that both Mr. Kitchin, the Morton vice-president in charge of production, and Mr. Halvarson, the regional sales manager, admitted that Continental's June 1961 price was "aimed directly at" petitioner. Petitioner's Brief, p. 52. It is necessary to distort completely Mr. Kitchin's testimony to make the charge. As the citations in petitioner's Brief (R. 86, 121) make clear, Mr. Kitchin testified only that he thought Continental's two-week price quotation was to meet the competition of Utah Pie, or some other manufacturer, or both. Meeting prices charged by dominant competitors certainly evidences no anticompetitive intent.

Mr. Halvarson testified that the June 1961 quotation was to get business in Salt Lake City, including business with petitioner's customers. (R. 680-81.) Since Utah Pie had the dominant share of the business the testimony merely stated the obvious.

Utah Pie attacks the Court of Appeals for having relied upon the evidence showing that for Continental to sell its 22-ounce pie in any volume it had to meet Utah Pie's prices for its larger pie on an ounce-for-ounce basis. But in so doing Utah Pie fails to point out the following facts of record: *First,* that it was repeatedly conceded by Utah Pie's only salesman and principal witness that in order to obtain significant sales a 22-ounce pie must sell for less than a 24-ounce pie (R. 802, 822, 825, 880); *second*, that every professional buyer testified that manufacturers' offers are evaluated on an ounce-for-ounce basis, and there was *no* testimony to the contrary (R. 220, 693, 712, 732-36; see also R. 664, 971, 1141); and *third,* that Utah Pie was unable to sell a 22-ounce pie instead of a 24-ounce pie under the Mayfresh label because the customer was unwilling to switch to the smaller pie for only a 10 cents per dozen price reduction. (R. 732.)

Not only was Continental's temporary price no lower than that being charged and offered by Utah Pie in Salt Lake City, but it was in no other sense an "unusually" low price. In 1960 Utah Pie had begun selling its 24-ounce Sonnyboy brand at a price of $2.88.[22] In June and July 1961, Continental was offering a price of $4.00 less $1.15 bill back in Los Angeles and Arizona, or a net price of $2.85, and immediately thereafter Continental was offering a net price of $2.89 in San Francisco. (R. 91.)

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[22] This price is f.o.b. Utah Pie's Salt Lake plant. It equals one cent per ounce. Continental's f.o.b. California price of 2.55 per dozen, quoted a year and a half later, was only 34/1000 of a cent less per ounce. Continental was achieving sharply declining costs and, as noted above, it was remarkably more efficient than Utah Pie. *Supra,* p. 10, n. 2.

Finally, the undisputed evidence establishes that when Utah Pie reduced its price to $2.75, Continental not only resisted buyer pressure to follow the prices down, but even offered to cancel orders previously placed by Safeway and American Food Stores at its higher price. *Supra*, p. 19.

On all the facts of record, and giving Utah Pie the benefit of every reasonable inference, the Court of Appeals was clearly correct in holding that Utah Pie's evidence that Continental's pricing in the Utah market might injure competition there was wholly insufficient.

D. The Evidence Was Also Insufficient to Establish That Utah Pie Had Been Injured in Its Business or Property by Reason of the Alleged Price Discrimination

In holding that Utah Pie had failed to prove an actual or likely lessening of competition in the Utah market by reason of Continental's sales during June and July 1961, the Court of Appeals properly rested upon the undisputed facts concerning Continental's marginal status in the market, Utah Pie's continuing and growing financial and sales success in the market, and Utah Pie's vastly increased sales during June, July and August 1961. The Court of Appeals was clearly of the opinion that on these facts, coupled with the failure of Utah Pie to prove by any competent evidence any specific losses of sales or profits, Utah Pie had failed to show by any substantial evidence that it had, even in some small measure, been injured as a result of Continental's few sales at the reduced price.

On the injury issue Utah Pie's case in the Utah market did not present a situation such as appeared in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251,

and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, where wrongful acts having a natural tendency to cause loss were shown, plaintiff was shown to have suffered losses which were not attributable to other causes, and circumstances made it impractical to require specific evidence that the proved wrong caused the proved losses. As the Court of Appeals pointed out, these cases are inapplicable for the initial reason that Utah Pie never even proved the wrong. (R. 1502-03.) Moreover, unlike the plaintiffs in *Bigelow* and *Continental Ore,* petitioner here showed no losses since it enjoyed ever increasing sales and profits throughout the complaint period, and particularly in 1961. Finally, this is not a case where the courts must allow guesses as to causation because of the unfairness to antitrust plaintiffs if they do not do so. If the truth were that Continental's sales to Safeway in Salt Lake City and American Food Stores in Ogden in June and July of 1961 caused those customers to shift their business away from Utah Pie, or caused Utah Pie to lose profits by reason of reduced prices, these facts were readily provable. The buyers for these chains were available to testify. And lost profits, if indeed there were any, could have been shown through Utah Pie's books and records comparing profits during the period with profits earned earlier in a comparable period.

Utah Pie did not call any of the buyers to show lost sales, nor did it produce any books and records to show lower profits. The buyers did testify, however, because they were called by Continental, and their testimony established that Utah Pie had not lost any business with them because of Continental's sales. (R. 695, 739.) In addition Utah Pie's own sales

records show that at the time of Continental's sales none of the buyers to whom Continental sold was then buying from Utah Pie. (Pl. Ex. 91; R. 551, 4420-41.)[28] The record also shows that Utah Pie's sales after it reduced its price to $2.75 increased so greatly that it is reasonable to infer that Utah Pie's profits during this period were greater, not less, than ever before.

Where, as here, a claim of damage rests upon a short-term promotion resulting in sales to only a few buyers, all of whom are available to testify, and where a plaintiff's losses of profits, if any, are provable from its own books and records, the law requires that plaintiff make that evidence available to the jury. *Riss & Co.* v. *Ass'n of American Railroads,* 190 F. Supp. 10, 18 (D. D.C. 1960), *aff'd,* 299 F.2d 133, 136 (D.C. Cir. 1962), *cert. denied,* 370 U.S. 916. *Accord, William Goldman Theatres, Inc.* v. *Loew's, Inc.,* 69 F. Supp. 103, 106-07 (E.D. Pa. 1946), *aff'd,* 164 F.2d 1021 (3d Cir. 1948), *cert. denied,* 334 U.S. 811.

Even though petitioner had only a two-week case against Continental as to which competent proof of injury, if any, was readily available, petitioner was allowed to introduce over objection the wholly unsupported "opinion" testimony of its one salesman that Utah Pie had lost huge volumes of sales over a three year period. (R. 562; Pl. Ex. 94; R. 568, 4590.) The Court of Appeals concluded this self-serving testimony was wholly worthless. (R. 1454.) The testimony even on its face had nothing to do with the one promotional effort which Utah Pie now concedes is its entire Utah

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[28] Safeway had recently bought one small order a month. (Pl. Ex. 91, R. 551, 4439-40.)

market case against Continental. Moreover, the testimony simply assumed that every dozen "lost" was lost to an unlawful discrimination in spite of the witness' own admission that he did not know what Continental's selling prices had been. (R. 565.) This opinion testimony, which conflicted with all the facts of record, including the witness' own admissions[24] and the factual testimony of disinterested third parties, was incompetent, lacking any foundation in fact. *Dantzler* v. *Dictograph Prods., Inc.*, 309 F.2d 326 (4th Cir. 1962), *cert. denied*, 372 U.S. 910; *American Sea Green Slate Co.* v. *O'Halloran*, 229 Fed. 77 (2d Cir. 1915); *Ronson Patents Corp.* v. *Sparklets Devices, Inc.*, 112 F. Supp. 676 (E.D. Mo.), *aff'd*, 202 F.2d 87 (8th Cir. 1953).

E. The Evidence Was Also Insufficient to Establish the Necessary Relationship Between the Alleged High and Low Prices

The Court of Appeals analyzed the case against Continental in terms of the statutory standard of substantial injury to competition. There is a fundamental alternative ground which the court could have correctly relied on to reverse the judgment of the trial court.

The Robinson-Patman Act proscribes certain price discriminations, *i.e.*, differences between prices; it does not purport to proscribe simply low prices. The concept of discrimination imports a comparison between prices. It must be the difference that injures, not simply a low price. *Sano Petroleum Corp.* v. *Ameri-*

[24] For example, the "opinion" was based on the proposition that Utah Pie's sales of private label brands to Safeway and Associated Grocers would have had no impact upon its sales of Utah label to those buyers, *i.e.*, that private and non-private labels do not compete. But the witness had to admit that they do. (R. 788.) See also Utah Pie's Petition, pp. 39, 45; Brief, p. 92.

can Oil Co., 187 F. Supp. 345 (E.D.N.Y. 1960); *Secatore's, Inc.* v. *Esso Standard Oil Co.*, 171 F. Supp. 665 (D. Mass. 1959).

In a secondary line case where the price difference exists between two purchasers competing in the resale of a product it is precisely the price difference itself that may injure. It is generally of no great moment to a retailer what price he pays for an item which he resells, so long as his competitors pay the same prices. As soon as differences appear, however, the non-favored purchaser is, or may be, injured by reason of paying a price higher than his competitor pays. In a primary line case, however, no injury to competition automatically follows, or is even probable, by reason of one set of prices in Salt Lake City and another set of prices in Bangor, Maine. Only if the lower price is somehow dependent upon, *i.e.*, made possible by, the higher price, is it the *discrimination* that may affect competition.

Some courts, including this Court, have suggested that in a primary line case the necessary relation between the high and low prices can be shown by proof that the seller has a monopoly or dominant position in some market which permits it to set arbitrarily high prices in that market with which to sustain the lower prices elsewhere. See, *e.g.*, *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115; *Atlas Bldg. Prods. Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843; *Maryland Baking Co.* v. *FTC*, 243 F.2d 716 (4th Cir. 1957); see also Rowe, *Price Discrimination Under the Robinson-Patman Act*, 166-68 (1962). But there is no such evidence in this case. Petitioner complains bitterly about Continental's overall size; but nowhere can it point to any

evidence that in any market Continental had the power to set its prices independently of its competition.

Another possible source of the necessary proof of connection between two prices is facts showing that a low discriminatory price resulted in such losses that, absent greater profits from a higher price elsewhere, the losses could not have been sustained. See, *e.g.*, *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356, 366-67 (9th Cir. 1955), *cert. denied*, 350 U.S. 991; *Shore Gas & Oil Co.* v. *Humble Oil & Ref. Co.*, 224 F. Supp. 922 (D.N.J. 1963).

But again this element is not present here. Continental has never denied—indeed it affirmatively showed—that at its $2.55-$2.59 price it was selling at the level of its direct costs and below the total of direct costs plus overhead expenses. (R. 123-27.) These facts show no subsidization. Throughout every year of its marginal business in the Utah market Continental more than compensated for its out-of-pocket expenses and thus contributed to its profit. (Ex. M-26; R. 634, 5454-59.) Any seller, no matter how small, nor how few markets it competes in, can afford short-term promotions at or above direct costs in an attempt to reenter a market. In this connection, as noted by the Court of Appeals, Utah Pie suffered substantially greater losses for an entire year while it was breaking into the market even though it captured 66 percent of the business in that year. (R. 1483; Pl. Ex. 92; R. 551, 4586.) Indeed it would be a rare case in which a seller in a new market with minimal volume could expect to be able to command a price in excess of the fully allocated costs of its entire operation.

The authorities have sanctioned substantially greater "losses." In the *Borden* case, *supra*, the Court of Ap-

peals held that a price of nine cents per half gallon of milk (seven cents of which was paid as commission to Borden's distributor), but charged only for a brief time in response to local competitive conditions, could not be held illegal. In *Dean Milk, supra,* the Commission itself held that a discriminatory price below cost lasting only four months was lawful in the context of market entry. In *Quaker Oats, supra,* also dismissed by the Commission, the sporadic prices attacked were similarly found to be below cost, and in *International Milling Co., supra,* an eight-week price reduction of 33 per cent—obviously below cost—was sustained in the context of a large national seller whose position in a local market was declining.

Utah Pie is undoubtedly aware of the fact that the small, sporadic losses shown in this record are insufficient to show either the necessity for subsidization or "predatory" intent. Throughout this case petitioner has asserted an untold number of demonstrably false claims of supposed incredible losses suffered by Continental. An example is the statement appearing at page 29 of its Petition for Certiorari that "Continental's $2.55 price . . . was below even the bare cost of production." Another example appears at page 17 of the Petition where it is claimed that "at the $2.55 price, Continental was losing 45 cents per dozen on its direct costs alone." Both of these statements are false, and their falsity was uncontrovertably demonstrated in the Court of Appeals, in the same manner as it is demonstrated in Appendix C to this Brief.

Utah Pie has, to be sure, abandoned these particular misrepresentations now that the full record is before this Court. Its claim now is merely that at $2.55 Continental's price was "below even the bare cost of

production, *sale and delivery.*" (Petitioner's Brief, pp. 52-53.) (Emphasis supplied.) In support of this most recent claim Utah Pie cites Pl. Ex. 29. (R. 2187.) This exhibit was conceded by Utah Pie's witness in the trial court to be erroneous and it does, indeed, grossly distort the facts. See Appendix C, *infra.*

The judgment of the Court of Appeals, then, may be affirmed on any of three legal grounds. A brief price discrimination by a marginal seller cannot be an adequate basis for a finding of a statutory probability of a lessening of competition at the primary level. Secondly, the evidence in this record is wholly insufficient to show any damage to petitioner resulting from the one pricing incident complained of. And finally, in truth, all that is complained of here is a low price in Salt Lake City, unrelated to any price anywhere else.

II. THE COURT OF APPEALS HAD AUTHORITY TO TERMINATE THIS LITIGATION AND DID NOT ABUSE ITS DISCRETION IN DOING SO

The Court of Appeals conducted a painstaking review of the record, and concluded that there was a failure of proof, that judgment should have been entered by the trial court for Continental and that the litigation should terminate. This Court has requested analysis of three questions which relate, basically, to the authority of a federal court of appeals to end the litigation when satisfied that there was insufficient evidence at the trial to support the judgment below.

Petitioner's Brief concedes both that the Court of Appeals' mandate precludes an application to the trial court for a new trial, and that the Court of Appeals had authority to make such an order. We agree.

Though normally such concessions by an adversary make further discussion unnecessary, we feel obliged to present the following analysis to the Court in view of the fact that these matters were raised by the Court sua sponte in its grant of the writ of certiorari.

A. Under the Court of Appeals' Ruling It Is Not Open to Petitioner to Move in the Trial Court for a New Trial

The parties agree that the Court of Appeals intended that its decision and mandate terminate this protracted litigation. The court did not use such language as "reversed and remanded for a new trial" or "reversed for further proceedings not inconsistent with this opinion" which is routinely employed when further litigation is contemplated. It instead remanded with instructions ". . . to enter judgment for the defendants." (R. 1526.) That order forecloses the trial court from granting a new trial. See, *e.g.*, *Johnson* v. *New York, N.H. & H.R.R.*, 344 U.S. 48, 49-50; *John Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82, 91; *Krock* v. *Electric Motor & Repair Co.*, 339 F.2d 73 (1st Cir. 1964), *cert. denied*, 377 U.S. 934; *Hartman* v. *Lauchli*, 304 F.2d 431 (8th Cir. 1962), *cert. denied*, 353 U.S. 965.[25]

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[25] This line of authority was summarized in City of Orlando v. Murphy, 94 F.2d 426, 429 (5th Cir. 1938), *cert. denied*, 299 U.S. 580:

> "The rules governing procedure in a federal trial court after reversal are well settled. Where the merits of a case have been once decided on appeal, the trial court has no authority, without express leave of the appellate court, to grant a new trial and rehearing, or a review, or to permit new defenses, on the merits to be introduced by amendment. Thus, if a case is affirmed on appeal, there is res adjudicata, and no power exists after the term to alter the decision. The same is true where, on reversal, a mandate is issued requiring

Petitioner never asked for a new trial, either in the trial court or on appeal, and never gave any reasons why it should have one. This does not mean, however, that the experienced panel that decided this case did not consider a new trial and conclude none was warranted. The court did, in fact, order a new trial of Continental's counterclaim, though neither party had asked for one. Thus it is clear that when the Court of Appeals reversed with directions to enter judgment for defendant it intended that the litigation be ended. The trial court may not now take any action inconsistent with terminating the litigation.

B. The Courts of Appeals Clearly Have Authority Upon Reversal to Direct Entry Below of a Final Judgment

Federal appellate authority to terminate litigation upon reversal of a trial court judgment has long been established in federal jurisprudence. The source of this authority is the federal statutes as construed by the cases.[26] The authority has existed since the founding of the Republic, and there is nothing in Rule 50(d) of the Federal Rules of Civil Procedure to suggest it has been abrogated. As noted, petitioner has conceded the existence of this authority, and argues only that it was misapplied here.

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the entry of a specific judgment. Where the reversing decision directs the entry of no specific judgment, but remands the cause for further proceedings in accordance with the opinion, the trial court, though receiving the cause for a retrial, is bound by all its rules, as the law of the case."

[26] Appellate "proceedings are governed entirely by the acts of Congress, the common law, and the ancient English statutes." Camp v. Gress, 250 U.S. 308, 318.

I. Prior to the Promulgation of the Federal Rules of Procedure the Federal Appellate Courts Had Authority Upon Reversal to Terminate the Litigation

The federal statutes have from the beginning provided the appellate authority exercised in this case by the Court of Appeals. Section 24 of the Judiciary Act of 1789 provided

> "That when a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed; and the Supreme Court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision." 1 Stat. 73, 85.

Thus under the Act of 1789 the federal appellate courts—this Court and the circuit courts—had full power to render such judgment or decree as the district court should have rendered. See, *Ballew* v. *United States,* 160 U.S. 187, 199.

Legislation subsequent to the Act of 1789 retained this broad appellate authority. The Act of 1872 provided that the federal appellate courts (both this Court and the circuit courts)

> "may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require." Act of June 1, 1872, ch. 255, § 2, 17 Stat. 197.

This statute was incorporated a few years later in Sections 636 and 701 of the Revised Statutes. Section

636 related to circuit courts; Section 701 to the Supreme Court. They were almost identical in wording. Section 701 provided:

> "The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon." Rev. Stat. § 701 (1875).

The present courts of appeals were established by the Act of March 3, 1891, ch. 517, 26 Stat. 826. Section 11 of the Act provided that existing provisions of law regulating the methods of review should regulate the system of appeals and writs of error in the circuit courts of appeals. Section 10 provided that on reversal the circuit court of appeals was to direct the further proceedings below. 26 Stat. at 829. The Act was regularly construed to extend to the circuit courts of appeals the same appellate authority as was spelled out in Section 701 of the Revised Statutes for the Supreme Court. See, *e.g.*, *Realty Acceptance Corp.* v. *Montgomery*, 284 U.S. 547, 550; *Camp* v. *Gress*, 250 U.S. 308, 318; *Ballew* v. *United States*, 160 U.S. 187, 201-02; *United States* v. *Illinois Sur. Co.*, 226 Fed. 653 (7th Cir. 1915), *aff'd*, 244 U.S. 376.

Supreme Court authority as defined in Section 701 and circuit court of appeals authority as defined by

the Act of 1891 were combined in the present Section 2106 of the Judicial Code, enacted in 1948.[27] *Bryan* v. *United States*, 338 U.S. 552. Section 2106 was derived, in pertinent part, from Rev. Stat. § 701 and from Sections 10 and 11 of the Act of 1891. H.R. Rep. No. 308, 80th Cong., 1st Sess. A173 (1947). Thus under the language and history of Section 2106 the appellate powers of this Court and of the courts of appeals are coextensive. Those courts "may . . . direct the entry of such appropriate judgment . . . as may be just under the circumstances."

The cases have affirmed the plain meaning of these statutes. They establish that the federal appellate courts have had authority throughout their history to reverse and direct entry of such order as the district court should have entered. See, *e.g.*, *Fort Scott* v. *Hickman*, 112 U.S. 150; *Allen* v. *St. Louis Bank*, 120 U.S. 20; *Churchill* v. *Buck*, 102 Fed. 38 (8th Cir. 1900); *Irvine* v. *Angus*, 93 Fed. 629, *modified*, 94 Fed. 959 (9th Cir. 1899), *cert. denied*, 175 U.S. 725. Appellate authority to terminate the litigation where a jury verdict had been obtained on legally insufficient evidence came before the Court in *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364. In *Slocum* the holding was that the Constitution prevented federal appellate courts from directing entry of judgment n.o.v. where the trial court had denied a directed verdict motion without reserving its decision, because at common law the trial court lacked such authority. The case did not turn on any lack of appellate authority to direct entry of a judgment that properly could have been entered by the trial court. If in fact appellate authority did not ex-

[27] 28 U.S.C. § 2106 (1964).

tend that far there would, of course, have been no occasion to reach the constitutional question.[28]

Subsequently this Court in *Baltimore & C. Line* v. *Redman*, 295 U.S. 654, ruled that the Constitution did not limit the power of a federal court to direct entry of the proper judgment where, on motion for directed verdict, the trial court had reserved its ruling on the issue of the sufficiency of the evidence. The holding of *Redman* was that the Court of Appeals in that case had authority to direct entry of judgment of dismissal against the verdict-winner where, under the procedural circumstances,[29] the Constitution did not prevent the trial court from doing so.

As soon as the *Redman* ruling cleared away the constitutional doubts created by *Slocum*,[30] the federal appellate courts—without any change in underlying statutory law—began exercising their authority to direct entry of judgment contrary to the verdict of the jury.[31]

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[28] In Johnson v. New York, N.H. & H.R.R., 344 U.S. 48, 51, the Slocum case was commented on as follows:

> "The *Slocum* case was understood to hold that the Seventh Amendment forbade United States courts to enter judgments in favor of one party after jury verdict in favor of the other."

[29] The reservation of ruling on the motion for directed verdict was, of course, made automatic by Rule 50(b) of the Federal Rules of Civil Procedure.

[30] See note 28, *supra*.

[31] The authority of the court of appeals in Redman did not come from the Conformity Act. Rev. Stat. § 914 (1875). That Act was consistently construed to have no application to appellate proceedings. Camp v. Gress, 250 U.S. 308, 318. Specifically, the Conformity Act did not "affect the power of the Circuit Court to grant or refuse a new trial." Chateaugay Iron Co., Petitioner, 128 U.S. 544, 555. "The Conformity Act does not extend to the Circuit Court of Appeals," Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 395.

See, *e.g.*, *New York Life Ins. Co.* v. *Brown*, 99 F.2d 199 (4th Cir. 1938), *cert. denied*, 306 U.S. 638; *Ely* v. *Greenbaum*, 85 F.2d 501 (2d Cir. 1936); *Kaeppel* v. *Mutual Life Ins. Co.*, 78 F.2d 899 (3d Cir. 1935). This Court has itself exercised the same statutory authority. In *New York, N.H. & H.R.R.* v. *Henagan*, 364 U.S. 441, plaintiff had obtained judgment on a jury verdict. The Court of Appeals affirmed. This Court held, per curiam, that plaintiff's evidence was insufficient to obtain a verdict and remanded to the trial court with instructions to enter judgment n.o.v. for defendant. *Accord, Oelbermann* v. *National City Bank*, 298 U.S. 638, where this Court modified the Court of Appeals' order reversing a trial court judgment to substitute direction of judgment of dismissal on the merits in place of direction of a new trial.

2. The Authority of the Courts of Appeals Upon Reversal to Terminate the Litigation Was Not Abrogated by the Federal Rules of Procedure

There is no evidence whatever that the Federal Rules of Civil and Criminal Procedure were intended to withdraw from the courts of appeals their authority to direct entry of final judgment contrary to a jury verdict. Moreover, since the enabling legislation authorizes the Supreme Court only to prescribe the civil practice and procedure of the district courts, the rules of civil procedure could not eliminate pre-existing appellate authority to terminate litigation even if they had been so intended. 28 U.S.C. § 2072 (1964). The cases since promulgation of the rules of civil procedure are consistent with these general observations.

In *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, this Court set out at length, and with no dissent, the procedures to be followed in both trial and appellate courts under Rule 50(b) and in so doing specifically

stated that where the verdict-loser moves in the district court both for judgment n.o.v. and for a new trial, and both motions are denied,

> "the losing party may appeal from the judgment entered upon [the verdict], assigning as error both the refusal of judgment *n.o.v.* and errors of law in the trial, as heretofore. The appellate court may reverse the former action and itself enter judgment *n.o.v.* or it may reverse and remand for a new trial for errors of law." *Id.* at 253-54 (footnote omitted).

In *Pence* v. *United States*, 316 U.S. 332, this Court affirmed the action of the Court of Appeals in reversing a trial court judgment entered on a jury verdict for plaintiff and precluding a new trial. 316 U.S. at 333. The Court of Appeals' reversal, and this Court's affirmance, were on the ground that the evidence so conclusively established the government's affirmative defense that its motions for directed verdict and judgment n.o.v. should have been granted.

No court of appeals has construed the Federal Rules of Civil Procedure to have abolished its authority to terminate litigation. On the contrary, citations are available from every circuit demonstrating that the rules have not been understood to have this effect. See, *e.g.*, First Circuit: *Ferro Concrete Const. Co.* v. *United States*, 112 F.2d 488 (1940), *cert. denied*, 311 U.S. 697; Second Circuit: *Venides* v. *United Greek Shipowners Corp.*, 168 F.2d 681 (1948); *Brennan* v. *Baltimore & O.R.R.*, 115 F.2d 555 (1940), *cert. denied*, 312 U.S. 685; *Lewis-Kures* v. *Edward R. Walsh & Co.*, 102 F.2d 42 (1939), *cert. denied*, 308 U.S. 596; Third Circuit: *Woods* v. *National Life and Acc. Ins. Co.*, 347 F.2d 760, 768 (1965); *Stopper* v. *Manhat-*

tan Life Ins. Co., 241 F.2d 465 (1957), *cert. denied*, 355 U.S. 815; *Psinakis* v. *Psinakis*, 221 F.2d 418 (1955); *Garman* v. *Metropolitan Life Ins. Co.*, 175 F.2d 24, 28 (1949); Fourth Circuit: *Richmond Television Corp.* v. *United States*, 354 F.2d 410 (1965); *Mutual Life Ins. Co.* v. *Asbell*, 163 F.2d 121 (1947), *cert. denied*, 332 U.S. 837; *George D. Horning, Inc.* v. *McAleenan*, 149 F.2d 561 (1945), *cert. denied*, 326 U.S. 761; Fifth Circuit: *Monsanto Chemical Co.* v. *Payne*, 354 F.2d 965 (1966); *Patterson* v. *Pizitz, Inc.*, 353 F2d 267 (1965), *cert. denied*, 383 U.S. 910; *Southern Pacific Co.* v. *Matthews*, 335 F.2d 924 (1964), *cert. denied*, 379 U.S. 970; *Stewart* v. *Gilmore*, 323 F.2d 389 (1963); *Cole* v. *Usry*, 294 F.2d 426 (1961); *Stanolind Oil & Gas Co.* v. *Canada*, 256 F.2d 829 (1958); Sixth Circuit: *General American Life Ins. Co.* v. *Central Nat'l Bank*, 136 F.2d 821, 822 (1943); *Great Northern Life Ins. Co.* v. *Vince*, 118 F.2d 232 (1941), *cert. denied*, 314 U.S. 637; *Connecticut Mutual Life Ins. Co.* v. *Lanahan*, 113 F.2d 935, *modifying on rehearing* 112 F.2d 375 (1940) [rehearing for express purpose of changing mandate from direction of a new trial to direction of judgment for verdict-loser]; Seventh Circuit: *Lappin* v. *Baltimore & O.R.R.*, 337 F.2d 399 (1964); *Kaminski* v. *Chicago River I.R.R.*, 200 F.2d 1 (1953); *Brunet* v. *S. S. Kresge Co.*, 115 F.2d 713 (1940), *cert. denied*, 313 U.S. 577 [petition for rehearing for express purpose of changing mandate from direction of dismissal of verdict-winner's claim to direction of new trial denied]; Eighth Circuit: *Federal S. & L. Ins. Corp.* v. *Kearney Trust Co.*, 151 F.2d 720 (1945) [petition for rehearing for express purpose of changing mandate from direction of judgment for verdict-loser to direction for new trial denied]; *Reliance Life Ins. Co.* v. *Burgess*, 112

F.2d 234 (1940), *cert. denied,* 311 U.S. 699; Ninth Circuit: *Massachusetts Mut. Life Ins. Co.* v. *Pistolesi,* 160 F.2d 668 (1947), *cert. denied,* 332 U.S. 759; Tenth Circuit: *Martin K. Eby Const. Co., Inc.* v. *Neely,* 344 F.2d 482 (1965), *cert. granted,* 382 U.S. 914; D. C. Circuit: *Capital Transit Co., Inc.* v. *Gamble,* 160 F.2d 283 (1947).

Court of appeals authority in criminal cases has had the same statutory history. Before adoption of Rule 29 of the Federal Rules of Criminal Procedure the courts of appeals exercised authority, presumably under Sections 10 and 11 of the 1891 Act, either to order dismissal when reversing for insufficiency of the evidence (*e.g., United States* v. *Bonanzi,* 94 F.2d 570 (2d Cir. 1938); *Cemonte* v. *United States,* 89 F.2d 362 (6th Cir. 1937)) or to direct that defendant stand a second trial (*e.g., United States* v. *Di Genova,* 134 F.2d 466 (3d Cir. 1943); *Pines* v. *United States,* 123 F.2d 825 (8th Cir. 1942)). The Act of February 24, 1933,[22] under which some of the rules of criminal procedure have been adopted, differs from the civil rules enabling statute in that it authorizes rules governing practice and procedure in the courts of appeals. This Court held in *Bryan* v. *United States,* 338 U.S. 552, however, that Rule 29 of the criminal rules providing for judgment of acquittal by the trial court on motion did not limit the previous authority of courts of appeals, under 18 U.S.C. § 2106, to order a new trial where the evidence was insufficient to sustain a conviction. *Accord, United States* v. *Ratke,* 316 F.2d 225 (6th Cir. 1963), *cert. denied,* 381 U.S. 939. At the same time the courts of appeals have retained their power under Sec-

[22] 47 Stat. 904, as amended, 18 U.S.C. § 3772 (1964).

tion 2106 to direct a judgment of acquittal for insufficiency of the proof. *E.g., United States* v. *Critchley*, 353 F.2d 358 (3d Cir. 1965); *Argent* v. *United States*, 325 F.2d 162, 172-73 (5th Cir. 1963).

Appellate practice in the various states also indicates the common judicial and legislative understanding of appellate court authority. A substantial majority of the states have explicitly endorsed the authority of appellate courts to direct entry of judgment contrary to a jury verdict. We have set out some of the relevant citations in the margin.[22] Many of these decisions make no reference at all to a state statute or rule. None of them relies on a statute any broader than Section 2106, and many in fact rely upon a state equivalent of Section 2106.

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[22] Shetter v. Rochelle, 2 Ariz. App. 607, 411 P.2d 45 (1966); Woodward v. Holliday, 235 Ark. 744, 361 S.W.2d 744 (1962); Hendrikson v. YMCA, 173 Cal. App. 2d 764, 344 P.2d 77 (1959); Louche v. Silvestri, 149 Conn. 373, 179 A.2d 835 (1962); Apalachicola Northern R.R. v. Tyus, 114 So.2d 33 (Fla. 1959); Southern Bell Tel. & Tel. Co. v. Brackin, 215 Ga. 225, 109 S.E.2d 782 (1959); Hale v. McCammon Ditch Co., 72 Idaho 478, 244 P.2d 151 (1952); Briney v. Illinois Cent. R.R., 401 Ill. 181, 81 N.E.2d 866 (1948); New York Cent. R.R. v. Casey, 214 Ind. 464, 14 N.E.2d 714 (1938); Hartman v. Kruse, 249 Iowa 1320, 91 N.W.2d 688 (1958); Anastasi v. McAllister, 189 Kan. 390, 369 P.2d 244 (1962); Louisville & N.R.R. v. Taylor, 290 S.W.2d 608 (Ky. 1956); Brunswick Diggers, Inc. v. Anthony Grace & Sons, Inc., 159 Me. 21, 187 A.2d 391 (1963); Sheehan v. Commercial Travelers' Mut. Acc. Assn., 283 Mass. 543, 186 N.E. 627 (1933); Cochrane v. Wittbold, 359 Mich. 402, 102 N.W.2d 459 (1960); De Vere v. Parten, 222 Minn. 211, 23 N.W.2d 584, 589-90 (1946); Parsons v. Lambert, 209 Miss. 649, 48 So.2d 143 (1950); Nelson v. Kansas City, 360 Mo. 143, 227 S.W.2d 672 (1950); Johnson v. Monmoth Lode & Uranium Explor. Corp., 136 Mont. 420, 348 P.2d 267 (1960); Wax v. Co-operative Refinery Ass'n, 154 Neb. 42, 46 N.W.2d 769 (1951); Jaroszewski v. Central R.R., 9 N.J. 231, 87 A.2d 705 (1952); O'Rourke v. New Amsterdam Cas. Co., 68

3. Nothing in Rule 50, or in the Decisions, Suggests That the Authority of Appellate Courts to Direct Final Entry of Judgment n.o.v. Where the Trial Court Should Have Done So Has Been Abolished

Even if under the enabling legislation, 28 U.S.C. § 2072, a rule of civil procedure could be written to terminate authority of the courts of appeals to deny a new trial, it is perfectly apparent that Rule 50 was not intended to do so. Again, petitioner's Brief does not argue otherwise.

The relevant provision of Rule 50 is subparagraph (d) for that is the only provision that reads on the situation where, as here, the trial court *denied* the motion for judgment n.o.v. The Rule provides:

> "SAME: DENIAL OF MOTION. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

N.M. 409, 362 P.2d 790 (1961); Paddock v. Church of St. Barnabas, 24 App. Div. 2d 716, 263 N.Y.S.2d 463 (1965); Dahl v. Nelson, 79 N.D. 400, 56 N.W.2d 757 (1953); Jusko v. Youngstown & N.R.R., 89 Ohio App. 496, 102 N.E.2d 899 (1951); Mercury Oil Refining Co. v. Richardson, 296 P.2d 964 (Okla. 1956); Kraft v. Montgomery Ward & Co., 220 Ore. 230, 348 P.2d 239 (1959); Kitchens v. Lee, 221 S.C. 59, 69 S.E.2d 67 (1952); Bergstresser v. Minnesota Amusement Co., 68 S.D. 579, 5 N.W.2d 49 (1942); Liddell v. Smith, 351 S.W.2d 335 (Tex. 1961); Cook v. Shoulder, 200 Va. 281, 105 S.E.2d 860 (1958); Muench v. Heinemann, 119 Wisc. 441, 96 N.W. 800 (1903).

Rule 50(d) plainly establishes that no requirement was suddenly imported into federal law via the Federal Rules of Civil Procedure that only trial courts may decide whether there is to be a new trial. Neither the language nor the history of the Rule suggests that a court of appeals may not prevent a second trial when convinced that a second trial would be improper either because the appellee has no additional evidence, or because what it claims to have is legally insufficient, or because it has no adequate reason for not having offered it at the first trial, or because whatever reason is urged for a new trial is not adequate.[34] Instead, the plain language of Rule 50(d) affirmatively recognizes the power of the courts of appeals to determine whether there shall be a new trial by providing that where a motion for judgment n.o.v. has been denied by the trial court, the party who prevailed on the motion "may" urge in the court of appeals that, in the event of a reversal, it be granted a new trial rather than suffering a final adverse judgment. While the Rule does not in terms provide for denials of new trials by the courts of appeals, the language in this respect is clearly permissive and not limiting.

Rule 50(d), moreover, does more than merely recognize the power of an appellate court to direct the entry of judgment in some cases. The language of the Rule, particularly when read in connection with the accompanying Advisory Committee Notes, strongly suggests, if it does not compel, the conclusion that upon a reversal for insufficiency of the evidence, a court of appeals shall, as a matter of course, direct the entry of a final judgment unless adequate grounds for the granting of a new trial are affirmatively brought to

[34] See 58 Colum. L. Rev. 517, 524-26 (1958).

its attention by the appellee. The Advisory Committee Notes state that "in appropriate cases" the appellate court is not "precluded" from itself directing that a new trial be had, and the Notes then go on to state:

> "Nor is it precluded in proper cases from remanding the case for a determination by the trial court as to whether a new trial should be granted. The latter course is advisable *where the grounds urged* are suitable for the exercise of trial court discretion." (28 U.S.C.A. p. 185 (1965 Supp.)) (Emphasis added.)

The plain import of these Notes is that a court of appeals, upon reversing for insufficiency of the evidence, will ordinarily remand with directions to enter judgment; that if there are any grounds upon which an appellee believes himself entitled to a new trial, he is expected to urge them in the court of appeals; and that the court of appeals will then determine if "the grounds urged" are sufficient, insufficient, or "suitable for the exercise of trial court discretion." It is only in the latter case that a remand for trial court consideration of the issue is contemplated.

This interpretation of the Rule is supported by considerations of policy and efficiency. Since under Rule 50(d) an appellee *may* ask for a second trial, to permit an appellee also to withhold the request and then move in the trial court after reversal would permit obvious forum shopping. If an appellee by failing to move in the court of appeals can prevent that court from passing upon the new trial question, the result is that the identity of the court deciding the new trial request is determined by tactical decisions of appellees, rather than by rule of law.

There is no question but that the courts of appeals do have power to review and reverse trial court grants of new trials. Reversals have occurred because the trial court's grant was based upon an error on a point of law,[35] or because the grant was an abuse of discretion.[36] Although grants of new trials are not themselves appealable for reasons of judicial administrative efficiency, these same reasons plainly dictate that when a case is already before the court of appeals it should undertake the same consideration of the new trial question that it would conduct if the parties went through a second trial. There can be no justification for a rule which would arbitrarily protract the federal trial process by rendering courts of appeals powerless to issue immediately the judgment they clearly can issue ultimately. *Cf. Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 250-53.

Rule 50(c) Does Not Apply

Subparagraph (c) of Rule 50 does not read on the situation. Rule 50(c) deals with "Conditional Rulings On Grant of Motion" (for judgment n.o.v.). The Advisory Committee Notes spell out the different functions of subparagraphs (c) and (d):

> "*Subdivision (c)* deals with the situation where a party joins a motion for a new trial with his motion for judgment n.o.v., or prays for a new trial in the alternative, and the motion for judgment n.o.v. is granted . . . .

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[35] Fassbinder v. Pennsylvania R.R., 322 F.2d 859 (3d Cir. 1963); American Mfgrs. Mut. Ins. Co. v. Wilson-Keith & Co., 247 F.2d 249 (8th Cir. 1957); Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956).

[36] Marshall's U.S. Auto Supply v. Cashman, 111 F.2d 140 (10th Cir. 1940), *cert. denied*, 311 U.S. 667; Pettingill v. Fuller, 107 F.2d 933 (2d Cir. 1939), *cert. denied*, 309 U.S. 669.

> "*Subdivision (c)(2),* which also deals with the situation where the trial court has granted the motion for judgment n.o.v., . . .
>
> "*Subdivision (d)* deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n.o.v. and any motion for a new trial having been denied by the trial court." 28 U.S.C.A. pp. 184-85 (1965 Supp.)

Obviously a Rule written to cover procedure where the trial court grants a motion for judgment n.o.v. cannot be read to have been intended to limit appellate authority—even if it could—where the motion was denied.

Rule 50(b), and the Cases Construing It, Are Not Applicable

Subparagraph (b) of Rule 50 regulates trial court proceedings. The Court has referred us to two decisions construing Rule 50(b) and has queried whether they are compatible with the order terminating further litigation in this case. *Globe Liquor Co., Inc.* v. *San Roman,* 332 U.S. 571; *Cone* v. *West Virginia Pulp & Paper Co.,* 330 U.S. 212. In both these cases the verdict-loser had refrained from moving the trial court for judgment n.o.v. as provided in Rule 50(b). In both the appellate court, by ordering judgment n.o.v., had done what the trial court could not have done for lack of the motion. In both the appellants had, by not following the procedure laid down in Rule 50(b), attempted to select the court which would rule on the new trial question. Here, on the contrary, the appellate court did just what the trial court had power to do. Here the party now seeking an affirmance of the Court of Appeals complied with the federal rules. The party seeking a reversal did not comply in that it refrained from the conditional request for a new trial

provided for by Rule 50(d). Here the appellee would foreclose appellate consideration of the new trial question; in *Cone* and *Globe* the appellant was attempting to foreclose trial court determination of the question.

The rulings of this Court in *Cone* and *Globe* were necessary to preserve the force and effect of Rule 50(b). They were also necessary to prevent forum shopping between trial and appellate courts on the new trial question. The ruling of the Tenth Circuit Court of Appeals is wholly compatible and an affirmance of that ruling will serve exactly the same considerations that underlay *Cone* and *Globe*. In fact, to allow petitioner to go back now and ask the trial court for a second trial would be altogether incompatible with *Cone* and *Globe*. To do so would rewrite Rule 50(d) to leave purely optional the conditional application for new trial which that Rule provides, thus sanctioning the same forum shopping that *Cone* and *Globe* reject.

Indeed, even the broadest rationale of *Cone* and *Globe* is inapplicable in a case such as this one in which the trial court denies the motion for judgment n.o.v. In *Cone* the Court wrote as follows:

> "[The trial judge] can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50 (b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of

> the case which no appellate printed transcript can impart. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded 'a last chance to correct his own errors without the delay, expense or other hardships of an appeal.'" 330 U.S. at 216 (citations omitted).

Had the Court of Appeals in the present case remanded for trial court consideration of a motion for a new trial it would not have presented the trial court with a last opportunity "to correct his own errors." The parties already have been subjected to "the delay, expense or other hardships of an appeal." Moreover, after there has been a time-consuming appeal, the trial judge "who saw and heard the witnesses and has the feel of the case" may no longer be sitting and, in any event, obviously no longer retains "a fresh personal knowledge" of the case. These considerations might favor a procedure whereby a verdict- and judgment-winner asks the trial court for a conditional ruling on a new trial motion; but of course Utah Pie made no such motion here.

We believe the foregoing analysis, particularly in the light of petitioner's concessions, makes it clear the Court of Appeals both intended to terminate this litigation and had authority to do so. To sustain the Court's power to direct entry of a final judgment would be entirely consistent with the *Cone* and *Globe* holdings. Indeed, to hold that the Court of Appeals lacked this power would be completely inconsistent with the entire course of this Court's prior decisions including particularly *Bryan* v. *United States, supra; Baltimore & C. Line* v. *Redman,*

supra; New York, N.H. & H.R.R. v. *Henagan, supra; Pence* v. *United States, supra;* and *Montgomery Ward & Co.* v. *Duncan, supra.* It would also be inconsistent with the plan of judicial administration plainly envisaged by Rule 50(d) of the Federal Rules of Civil Procedure. The only remaining question is whether the court below committed reversible error by not, sua sponte, granting petitioner a new trial, *i.e.*, whether the Court of Appeals abused its discretion. *Sparrow* v. *Strong,* 70 U.S. 97, 105. For the following reasons we submit that its order was the only proper order under the circumstances.

C. There Was No Reason to Award Petitioner a New Trial and It Would Have Been an Abuse of Discretion to Have Done So

Petitioner never asked for a new trial until invited to do so by this Court's Order granting the writ of certiorari. The excuse now given is that petitioner could not anticipate that the Court of Appeals would hold that petitioner had withdrawn its Denver "case" from the jury. There are a number of reasons why this argument is not persuasive.

1. The Holding of the Court of Appeals Was Foreseeable and Petitioner Had Ample Opportunity to Argue Its Claim for a New Trial Before That Court

This was not a Denver case until petitioner's Brief in the Court of Appeals substantially abandoned its prior reliance upon a case in the Utah market and tried to get an affirmance based on arguments relating to the Denver market. In response to that newly resurrected claim Continental pointed out in a Reply Brief in the Court of Appeals that the judgment could not be affirmed on the basis of evidence relating to Denver, both because the Denver claims had never been sub-

mitted to the jury and because, in any event, the evidence was insufficient as a matter of law. Reply Brief of Appellant, Dkt. 7306, pp. 5-12. This Reply Brief was filed and served more than a week before the oral argument. Petitioner had ample time either to file a written conditional application for a new trial, or to ask for a new trial at the oral argument. Petitioner also had twenty days after the Court of Appeals' decision came down in which to petition for rehearing under Rule 24 of the court's rules pointing out why it should have a new trial. Petitioner did none of these.[37]

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[37] This Court has properly required adherence to such basic rules. In Helis v. Ward, 308 U.S. 365, this Court granted a writ of certiorari solely to determine whether the Court of Appeals should have granted a new trial. The trial court had dismissed petitioner's claim. The Court of Appeals reversed and ordered entry of judgment for plaintiff. In this Court the original defendant argued that he would have presented additional evidence had he anticipated the Court of Appeals' decision. "But the difficulty with petitioner's position is that he has not preserved that point. On his petition for rehearing to the Circuit Court of Appeals, petitioner did not ask that court to allow him a new trial in order to attack the umpire's report." 308 U.S. at 369-370 (footnote omitted).

In Forged Steel Wheel Co. v. Lewellyn, 251 U.S. 511, the trial court had entered judgment for plaintiff on a jury verdict and the Court of Appeals reversed. This Court noted that "Objection is made to the action of the Circuit Court of Appeals in simply reversing the judgment of the District Court and not remanding the case for a new trial. There was no objection made to that action and no request for a remand of the case. And besides there was nothing to retry. The case involves only propositions of law." 251 U.S. at 515-516.

The question also comes up where preservation of a federal question is at issue and the inquiry is whether a petition for rehearing to the court below raised the question in time. This Court looks to whether the court below "proceeded on a ground so unexpected as to make timely" raising the federal question on petition for rehearing. Wilson v. Cook, 327 U.S. 474, 485.

2. Petitioner Intentionally Refrained from Submitting the Denver Claim to the Jury

The Court of Appeals properly held that the judgment could not be affirmed on the basis of petitioner's claim as to the Denver market because that claim had never been submitted to the jury. (R. 1504-05.) The Court of Appeals was correct in further holding that petitioner's contention as to the Denver market was "a departure from the theory on which Utah Pie, by its requested instructions, asked the court to submit its claim to the jury." (*Ibid.*)

We have noted above the fact that all of the court's instructions referred alternatively to the "Utah" market or the "Salt Lake City" market, and that they never once mentioned the Denver market. Petitioner never took an exception to these definitions of its case as, of course, it could not do in view of the language of its own requested instructions. These instructions were consistent with the form of verdict, prepared by petitioner, which recited a finding of discrimination by Continental in the "Utah trading area."

These facts establish a deliberate and understandable decision by petitioner to ask the jury for a verdict only on the Utah market. The Denver claim was useful to petitioner during the trial for it gave an opportunity to point to the only respectable volume Continental enjoyed in any market. To have *expressly* withdrawn the claim at the conclusion of the trial would have been damaging to petitioner in the eyes of the jury. But to send the case to the jury in terms that could be construed to have submitted a Denver case would destroy any chance Utah Pie

might have for an affirmance on appeal. For where two claims go to the jury and one is plainly bad, a general verdict cannot be allowed to stand.[38] The Denver case was even more deficient than the case in the Utah market, as we point out immediately below.

This tactical decision by petitioner's experienced trial counsel distinguishes this case from *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, cited by the Court of Appeals (R. 1505), and referred to by this Court in its Order granting certiorari. At the trial of the *Weade* case plaintiff had secured a verdict and judgment on the grounds that defendant was a common carrier and as such owed a duty to exercise "the highest degree of care" to plaintiff. The Court of Appeals reversed on the ground that defendant was not a common carrier and therefore its duty was not measured by that test. The Court of Appeals directed judgment below for defendant. This Court affirmed, but eliminated the direction for judgment. Both the complaint and the evidence suggested defendant was liable as an agent for negligence—a theory of liability involving a lesser duty on the part of the defendant than that upon which the case was tried.

In setting aside the direction of judgment this Court did not say the Court of Appeals had no power to direct entry of judgment. Because plaintiff had a tort

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[38] Wilmington Star Mining Co. v. Fulton, 205 U.S. 60, 77-79; Detroit, T. & I.R.R. v. Banning, 173 F.2d 752, 755 (6th Cir. 1949), *cert. denied*, 338 U.S. 815; Rashaw v. Central Vermont Ry. Inc., 133 F.2d 253, 256 (2d Cir. 1943); Roth v. Swanson, 145 F.2d 262, 269 (8th Cir. 1944); Parker v. Gordon, 178 F.2d 888, 895 (1st Cir. 1949); Christian v. Boston & M.R.R., 109 F.2d 103, 105 (2d Cir. 1940); Northern Pacific R.R. v. Haugan, 184 F.2d 472, 480-81 (8th Cir. 1940); Cygan v. Chesapeake & O. Ry., 291 F.2d 782, 783 (6th Cir. 1961).

theory of liability which it naturally had not prosecuted in reliance upon a favorable trial court ruling on its claim of common carrier liability requiring a lesser burden of proof, plaintiff ought to have an opportunity to present the tort theory. The case clearly does not stand for a sweeping command that appellate courts may never choose between new trial and direction of final judgment. *Accord, Byrd* v. *Blue Ridge Rural Elec. Co-op., Inc.,* 356 U.S. 525.

In this case petitioner by no means altered the presentation of its case to the jury because of any rulings made by the trial court. What was presented to the jury was the result of petitioner's own election, deliberately made for comprehensible reasons. The Court of Appeals clearly did not abuse its discretion by refusing to permit petitioner to avoid the effect of its election by having a new trial on Denver thereby, in effect, splitting his grounds for recovery. See *Baltimore S.S. Co.* v. *Phillips,* 274 U.S. 316, 320; *United States* v. *California & Oregon Land Co.,* 192 U.S. 355, 358.

3. The Record on Denver Does Not Contain Facts Sufficient to Support a Verdict

Petitioner makes no claim it has any new evidence on Denver which it wants permission to introduce. Its claim is that it made out a case on Denver sufficient in law that it intended to have go to jury. The fact is that the Denver evidence is wholly insufficient and could not support the verdict even if it had been submitted to the jury.

The evidence on the Denver market is stated above. Petitioner's case rests upon nothing more than sales of two truckloads of pumpkin and mince pies to a Denver buyer, Mr. Doil Smith, late in 1959. Petitioner pro-

duced no proof of any lessening of competition in Denver, and certainly no proof that Continental's brand, only one among many, had been the cause of any lessening.

Moreover, the Court of Appeals plainly reached the correct conclusion that even petitioner's proof of injury in the Denver market was wholly insufficient, for it consisted of the same unsupported and incompetent opinion testimony that was produced for the Utah market. Solely on this basis, and nothing else, petitioner was allowed to base damages on 231,500 dozens of sales "lost" to Continental in the Denver market over a three year period. The figure included an amount for 1961 greater than Continental's entire volume in that year. The testimony had all the legal defects reviewed above in terms of the Utah market. The "opinion" was, moreover, flatly refuted by the factual testimony of the only buyer in the Denver market who ever bought from Utah Pie in more than insignificant amounts.

Without defining what markets it is talking about, petitioner's Brief now argues several factors which it claims to have proved and which it claims permit affirmance of the verdict. We deny both their factual premises and the legal conclusions, but it is at least illuminating to compare the present arguments aimed at the case in general with the facts in the record on Denver. Petitioner now argues that evidence of "below cost" selling may be taken by the jury to find injury to competition. But there has never been a claim or proof that Continental's Denver sales were below cost. Petitioner argues the importance of concentration, but as to Denver the only evidence is that there was "tremendous" growth in brands being offered. (R. 747.) Petitioner claims an advantageous

location for its plant which is supposed somehow to have legal significance. But in terms of Continental this argument cuts against Utah Pie for Continental's Iowa plant is 4 cents per dozen closer to Denver than is Utah Pie's plant. (Ex. M-2; R. 379, 5404; R. 575.) Petitioner claims the jury can guess at the supposed synergistic effect on competition of each defendant's "discriminations" combined with the others' (thus losing its conspiracy case but having its benefits). But, other than the "Bel Air" dispute, there is not even a claim of any discriminatory pattern by Pet or Carnation in Denver. Petitioner claims that Continental's brand was a "price-leader" in the Utah market[39] but it has not even got its salesman's testimony to support such a claim as to Denver. Petitioner's claim that Continental's June 1961 prices were the lowest ever in the Utah market cannot be made as to Denver for there is no such evidence. And, finally, petitioner's reliance on the inadmissible testimony of Mr. Chapman's argument with Rigby cannot bolster its Denver case for Chapman had nothing to do with Denver.[40]

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[39] On 2 per cent of the market!

[40] The testimony was admitted solely on the basis of counsel's representation that he would connect up this incident with Continental. (R. 140-42.) No such proof was ever forthcoming. The fact established at the trial, consistent with results of discovery, was that Continental had never even known about the incident until the lawsuit was started. (R. 178-79.) In any event, even if Continental had been informed of it, the entire matter would have remained irrelevant absent some showing that Continental had in some way adopted or shared in Chapman's alleged hostility to Utah Pie.

Even though the promised evidence of a connecting link with Continental was never produced, the trial court refused to instruct the jury to disregard this highly prejudicial testimony and instead permitted Utah Pie's trial counsel to dwell on it in his closing argument. (R. 1443-44; 1239-40.)

There are other facts which underline petitioner's failure of proof in Denver. First, it is established through petitioner's own admissions on cross-examination that it could have sold at a profit in Denver at a price of $2.95 per dozen—its $2.75 Salt Lake City price, which was a profitable price, plus the 20 cents per dozen it cost to truck pies to Denver. (R. 575, 831.) There was not one sale by Continental in Denver through all the years in question that was as low as $2.95 per dozen. Obviously therefore Continental's Denver prices did not keep petitioner out of the Denver market.

Second, there is a failure to prove even the elementary fact of a price discrimination as to Denver. At page 51 of its Brief petitioner relies, as it did in the Court of Appeals, on a tabulation supposedly showing a pattern of discrimination as to the Denver market. This tabulation is based on Pl. Ex. 111 which simply shows offering prices, and not selling prices. Not only are mere offering prices wholly irrelevant to any Robinson-Patman Act case as previously conceded by petitioner in both the trial and appellate court (see, *e.g.*, Brief of Appellee, Dkt. 7308, p. 17; R. 282), but offering prices are especially irrelevant in an industry such as this one where, in petitioner's own words, "sales tend to be made during periods of low prices, and not in the intervening intervals of high prices." Petitioner's Brief, p. 111. (See also, R. 232, 686.)

In addition to this defect, the selective basis upon which the tabulation on page 51 was compiled is significant. In 1959 the high offering prices are found in the Arizona, Los Angeles, and San Francisco markets. Throughout most of 1960 only Arizona shows a higher

offering price. In 1961 the high offering price can be found only in Los Angeles, then San Francisco, then in Seattle, Portland and Spokane. This jumping about simply underlines the basic fact that prices fluctuate according to competition in each market and no seller has the ability to maintain uniformly high prices in any market.

Petitioner has now for the first time developed in this Court an additional theory of proof of a price discrimination as to Denver. This is that lower prices were charged in Denver than were charged in the Washington markets. Petitioner's Brief, App. C. As noted above, this is not a claim which was before the trial court. It is flatly inconsistent with petitioner's present argument in other parts of its Brief that the jury was asked to, and did, find low prices in Washington, Oregon, Denver, and Utah-Idaho to the injury of petitioner, with high prices in California. Petitioner's Brief, pp. 49-50. Appendix C is also inconsistent with petitioner's argument in the Court of Appeals that Continental's prices in the "Pacific Northwest were Predatory in Intent." Brief of Appellee, Dkt. 7306, p. 19. Appendix C is in fact simply a further example of the kind of shifting, factually inconsistent claim that has been advanced at every stage of this litigation. It demonstrates more clearly than anything else why it would have been an abuse of discretion for the Court of Appeals to permit a new trial on still another theory.

At best, however, Appendix C only purports to prove the mere fact of a price difference between Denver and Washington. Because it is a brand new claim, and because it purports to prove merely a price difference, it is without legal significance at this stage of the

litigation. Should this Court conclude this comparison does have some significance, however, it is necessary to note it leaves much unsaid and that the price comparisons set forth in Appendix C are completely misleading.

The record shows, for instance, that Appendix C does not compare comparable transactions. Thus, Appendix C compares sales made ex-warehouse in Seattle with full truck shipments into the Denver market. See, *e.g.*, the entry for July 1-10, 1960 (R. 3176, 4035). The price differential between full truck prices and ex-warehouse prices on sales of amounts down to one dozen existed in every market and amounted to at least 16 cents per dozen. (Pl. Ex. 8; R. 74, 2049.)[41]

Secondly, there is no comparability as to sources of supply. Not only are ex-warehouse sales compared with full truck sales, but even on a full truck basis the sales are not comparable for Washington sales came out of California co-packer plants, while Denver sales came out of Continental's wholly-owned plants in either Iowa or Virginia.[42] *Compare, Lloyd A. Fry Roofing Co.*, FTC Dkt. 7908 (July 23, 1965) (Concurring Op. 3).

The prices listed in Appendix C also do not distinguish between Continental's 22-ounce and its 24-ounce pies. From April of 1959 to April of 1960 Continental was selling 22-ounce apple and cherry pies in Denver, and at the same time it was selling 24-ounce apple and

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[41] The ex-warehouse price must reflect the cost of carrying inventory in local frozen food warehouses. The argument advanced in Utah Pie's Brief, pp. 89-90, that in a primary line case it is relevant to compare full truck prices in one market with ex-warehouse prices in another where the same quantity differentials apply is simply absurd.

[42] Freight costs to the Denver market were about one half the freight costs to the Seattle market. (Ex. M-2; R. 379, 5404; R. 663.)

cherry pies in the northwest markets. Only in April 1960, did Continental extend its 22-ounce pies to its western region—the area west of the Rocky Mountains. (Pl. Ex. 86; R. 538, 3984, 4017.)

Further, the prices set forth in Appendix C do not reflect Continental's bill backs. This invariably tends to increase the apparent price differential because bill backs were used in the northwest markets and were not used in Denver. The record is difficult to follow in this respect, but a comparison of invoice prices in the two markets with the net prices listed on Pl. Ex. 111 discloses substantial discrepancies in the northwest markets. These are in fact due to the use of bill backs in those markets which were recorded in the computations of net prices appearing on Pl. Ex. 111.

Moreover, even on the minimal record that exists as to a mere price difference, it is clear that Continental's sales in the northwest markets were so limited (*i.e.*, about 5,500 dozen apple pies in the entire two state area during 1959) that Continental was not earning vast profits in the northwest with which to "subsidize" its Denver sales even if, as is not the fact, the latter sales were shown to require subsidizing.

In directing that judgment be entered in accordance with Continental's trial court motions the Court of Appeals intended to, and did, exercise its established authority to deny a new trial on Denver. In this it was clearly correct. This is not a case in which a party has been induced by an erroneous trial court ruling to rely upon one of two alternative theories of recovery. Utah Pie refrained from submitting to the jury whatever claims it had on Denver, and there were obvious tactical reasons for doing so. Utah Pie presented all of the evidence it had on the Denver claim, and it is

virtually beyond argument that the record does not contain sufficient evidence to sustain a verdict on Denver. Utah Pie does not ask to supplement that evidence. Its patent insufficiency is an alternative ground for affirmance.[48]

CONCLUSION

The Court of Appeals held as to the Utah market that petitioner's proof was insufficient as a matter of law to support a judgment that Continental's sales as a result of a two-week area price difference might lessen competition generally, or that Utah Pie had been injured within the meaning of Section 4 of the Clayton Act. 15 U.S.C. § 15 (1964). Petitioner has made no plea for a new trial on the Utah market claim. The Court of Appeals' disposition of that claim should be affirmed on either, or both, of the grounds stated by the Court of Appeals, or on the alternative grounds stated in this Brief.

As to the Denver market, the Court of Appeals held that petitioner had not submitted this claim to the jury and, also, that in any event petitioner had again produced no competent proof of injury to its business or property by reason of any unlawful acts by Continental in that market. The judgment should be affirmed as to the Denver market on either, or both, of these grounds, or on the alternative grounds stated in this Brief.

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[48] Petitioner's demand for a new trial assumes sufficient facts in the record to support a verdict on the Denver market. Should this Court reject Continental's position that in no event is petitioner now entitled to a new trial, before a new trial can be allowed either this Court or the Court of Appeals must pass upon Continental's further position that the evidence is altogether insufficient to support a judgment on Denver.

The Court of Appeals' decision foreclosing a second trial on the Denver market claim should be affirmed both because the law recognizes the authority so to rule, and because on the particular facts of this case it was no abuse of discretion to deny a new trial that was never requested and which in any event would be a futile gesture since Utah Pie's proof as to the Denver market was wholly insufficient to support a judgment.

If this Court should fail to affirm the Court of Appeals, it should be noted that several issues are pending there which that court was not required to decide in view of its disposition of the case on other grounds, and which that court should be left free to decide.

Petitioner's plea for attorneys' fees prior to obtaining any judgment against Continental is plainly without support in law or equity and should be denied.

For the foregoing reasons the judgment of the Court of Appeals as to this respondent should be affirmed.

Respectfully submitted,

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28 November 1966

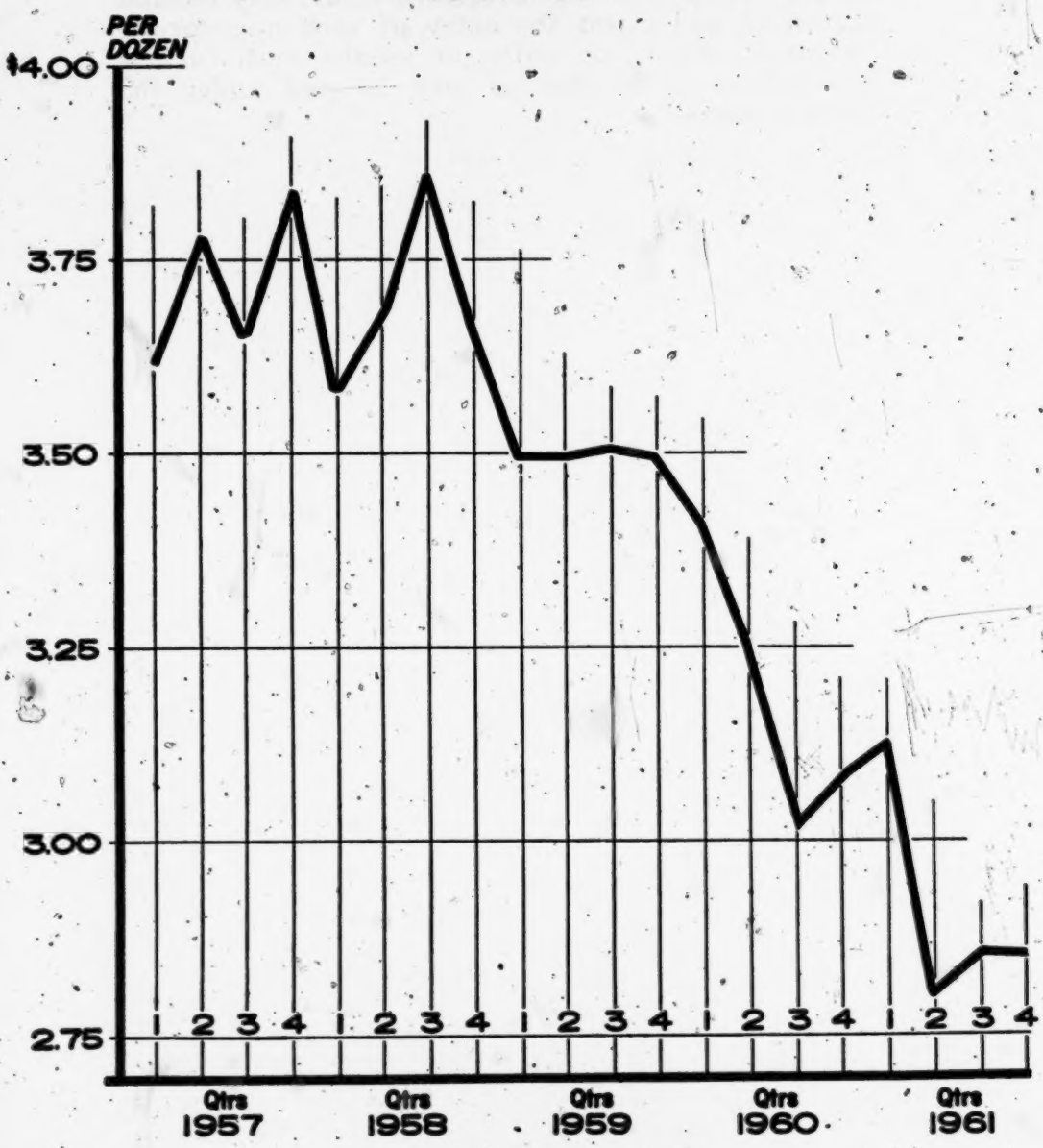
APPENDIX A

Act of June 25, 1948, ch. 646, 62 Stat. 963, 28 U.S.C. § 2106:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

APPENDIX B

AVERAGE COST OF MORTON APPLE PIES LAID DOWN IN SALT LAKE CITY 1957-61



(Ex. M-22; R. 643, 5450)

APPENDIX C

Analysis of the Record Upon Which Petitioner Relies for Its False and Exaggerated Claims of Continental Losses

The complaint alleged that Continental had sold in the State of Utah at prices below its "cost of production and cost of distribution," and, alternatively, at prices "below the costs of production." (R. 16, 19.) In an effort to prove these allegations Utah Pie first constructed an exhibit, which was finally introduced by Continental to show "a change of method, rather than for the truth of the facts therein stated." (Ex. M-9; R. 379, 5433.) This exhibit showed that Continental had in general sold well above its total direct costs of manufacture, sale and delivery, but that its $2.55 price on apple pies in the summer of 1961 resulted in sales at a price of 45 cents per dozen below these total direct costs. This, however, was accomplished by charging Continental 35 cents per dozen freight costs against the $2.55 f.o.b. plant price, and by using an erroneous cost of production 11 cents higher than the actual cost. (R. 362; Ex. M-1; R. 631, 5399.) The exhibit contains other errors but these two alone add up to 46 cents per dozen.

After these errors had been pointed out by Continental prior to trial (R. 369), Utah Pie's accountant constructed a new study, which was placed in evidence as plaintiff's Exhibit 29. (R. 268, 2187.) This is the exhibit cited by Utah Pie for its statements in the Petition for Certiorari, pp. 17, 29, that at $2.55 Continental was selling "below even the bare cost of production" and was "losing 45¢ per dozen on its direct costs alone." It is also the authority given for the assertion now made that the $2.55 price "was below even the bare cost of production, sale and delivery." Petitioner's Brief, pp. 52-53.

Plaintiff's Exhibit 29, however, contains errors just as egregious as did its earlier study. The assertion that the $2.55 price was "below even the bare cost of production"

is based on the same error pointed out with respect to Ex. M-9, *i.e.*, use of the wrong manufacturing cost. (R. 362.) The assertion that this exhibit shows a loss of 45 cents per dozen on direct costs again assumes a conversion of the $2.85 delivered price shown on the exhibit to a $2.55 f.o.b. California price, but no change in the 35 cents freight cost, and no correction of the 11 cents per dozen error on manufacturing cost. An additional error of substantial proportions in plaintiff's Exhibit 29 is that after showing the prices net of all temporary price declines and bill backs, it incorporates as an item of allocated cost these very same temporary price declines and bill backs under the heading "Other Direct Selling." (R. 364-65.) And as to every other item included in the "Other Direct Selling" category, petitioner's accountant had to admit he had no evidence that any one was applicable to Continental's sales of frozen fruit pies in the Utah market. (R. 365-67.) Finally, this exhibit, as did Exhibit M-9, continued to include as a "cost" item an allocated 2 cents per dozen for "spoils." This was an item taken from the books of the Carnation Company. (R. 359-61.) In fact Continental paid no spoilage claims. (R. 222.)

The actual facts pertaining to Continental's total direct costs appear in Ex. M-26, R. 634, 5454. This is the only unimpeached cost exhibit in the record. It can be either accepted as accurate or rejected. If rejected the record is barren of any cost evidence except that which is demonstrably false.